88-817

Supreme Court, U.S.
FILED
SEP 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROSA CARTER, ADMINISTRATRIX
OF THE ESTATE OF ADRIAN
MILES CARTER, DECEASED,

Petitioner,

v.

CITY OF CHATTANOOGA, TENNESSEE

Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether or not the legal standards announced by the Sixth Circuit Court of Appeals in Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983), and affirmed by the Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), holding that a Tennessee statute, and a city's policy based on it authorized unconstitutional seizures under the Fourth Amendment as applied to those suspected of committing non-dangerous felonies, who were not armed nor otherwise apparently dangerous, should have been applied retroactive to the facts of the case at bar and the petitioner granted judgment notwithstanding the verdict or, in the alternative, a new trial.

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROSA CARTER, ADMINISTRATRIX
OF THE ESTATE OF ADRIAN MILES
CARTER, DECEASED,

Petitioner,

v.

CITY OF CHATTANOOGA, TENNESSEE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Rosa Carter petitions for a writ of certiorari to review a final decision of the United States Court of Appeals for the Sixth Circuit denying the retroactive application of the principles set out in Garner v. Memphis Police Department, 710 F. 2d 240 (6th Cir. 1983), and affirmed by the Supreme Court in Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985).

OPINIONS BELOW

The memorandum of the Trial Judge (App. 26a - 40a) overruling petitioner's motion for partial summary judgment. Memorandum and order of the Trial Judge (App. 40a - 52a) overruling petitioner's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The opinion of the Panel of the United States Court of Appeals for the Sixth Circuit (App. 54a - 92a) reported, 803 F. 2d 217 (6th Cir. 1987) and the opinion of the en banc Court of Appeals for the Sixth Circuit. (App. 93a - 148a)

JURISDICTION

Jurisdiction to review the judgment in question by writ of certiorari is provided by 28 U.S.C. Sect. 1254. This petition is being filed within 90 days of the United States Court of Appeals for the Sixth Circuit's decision of June 27, 1988.

STATUTE INVOLVED

(Civil Rights of 1871, 42 U.S.C. Sect. 1983)

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Adrian Miles Carter was shot and killed by a Chattanooga police officer, Paul Kyle, on December 21, 1982, as he fled from the scene of a house burglary. Carter's mother as administratrix brought suit against the officer and the City of Chattanooga under 42 U.S.C. Sect. 1983, claiming a violation of her son's Fourteenth Amendment rights. (App. 1a - 7a complaint). Subject matter jurisdiction of the trial court was invoked pursuant to 28 U.S.C. Sect. 1343, and was not in dispute. (App. 8a - 10a) (Trial court's pretrial order).

At the time of the shooting, the City of Chattanooga trained its police officers in accordance with Tennessee's fleeing felon statute, T.C.A. 40-808 (1975), recodified in 1982 as T.C.A. 40-7-108; [1]which authorized the use of deadly force to apprehend a fleeing felon after notice of intent to arrest.

Prior to trial the Sixth Circuit decided Garner v. Memphis Police Department, 710 F. 2d 240 (6th Cir. 1983), aff'd sub nom. Tennessee v. Garner, 471 U.S. 1,105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), holding that the Tennessee statute and a city policy based on it authorized unconstitutional seizures.

---

[1]T.C.A. Sect. 40-7-108 provides:
Resistance to officer. --If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

After the Circuit Court's decision in Garner, supra, petitioner amended her complaint to include a Fourth Amendment claim, and moved for summary judgment as to liability seeking to try only the issue of damages. (App. 11a - 12a). The Respondent, City filed a motion for summary judgment requesting that the Garner decision not be retroactively applied and Defendant Kyle filed a motion for summary judgment based upon his qualified immunity. (App. 13a - 25a).

On January 27, 1984, the United States District Judge overruled the petitioner's motion for partial summary judgment; declared the City's written policies unconstitutional under Garner and overruled its motion for summary judgment; granted Defendant Paul Kyle's motion for summary judgment and placed the matter for trial to determine whether the actions of Defendant Paul Kyle satisfied the standards listed in the Garner case. (App. 40a).

Trial was held on January 30 and 31, 1984, the jury returned a verdict in favor of the Respondent, City (App. 41a) and petitioner filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial (App. 42a - 48a) both of which were overruled and petitioner appealed to the Sixth Circuit Court of Appeals.

Prior to the Court of Appeals decision the Supreme Court issued its ruling in Tennessee v. Garner, supra (March 27, 1985). A panel of the circuit court considered the appeal and reached a decision reported in 803 F. 2d 217 (6th Cir. 1987). (App. 54a - 92a). That decision was vacated when the court decided to hear the case en banc.

On June 27, 1988, the en banc Court held that Garner, supra would only be applied prospectively and affirmed the judgment for the Respondent, City of Chattanooga. (App. 93a - 148a). This petition followed.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT RENDERED IN THE CASE AT BAR IS IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME ISSUE.

This decision has created a conflict in the circuits on an important constitutional issue. Seven other circuits have ruled contrary and have applied the Garner ruling retroactive in the following cases:

(1) Fernandez v. Leonard, 784 F. 2d 1209, 1217 (1st Cir. 1986), under Garner, police officer violated suspect's Fourth Amendment rights on December 27, 1976).

(2) Kidd v. O'Neil, 774 F.2d 1252, 1255-56 (4th Cir. 1985) (under Garner, summary judgment reversed where police used excessive force against suspect on April 15, 1983;

(3) Griffin v. Hilke, 804 F. 2d 1052, 1055 (8th Cir. 1986), cert. denied, 107 S. Ct. 3185 (1987) (Garner applies to Sect. 1983 action where suspect shot on February 18, 1978);

(4) Ryder v. City of Topeka, 814 F. 2d 1412, 1417-18 (10th Cir. 1987) Garner applies to suit where fleeing suspect shot by police on March 25, 1979;

(5) Pruitt v. City of Montgomery, 771 F. 2d 1475, 1478-79 (11th Cir. 1985) Garner applies to Sect. 1983 action where plaintiff shot by police on September 1, 1982); affirming a grant of partial summary judgment.

(6) Jamieson v. Shaw, 772 F. 2d 1205, 1209-10 (5th Cir. 1985) District Court should have permitted plaintiff suspect to amend complaint with Fourth Amendment claim under Garner for injury on July 25, 1982);

(7) Bell v. City of Milwaukee, 746 F. 2d 1205, 1278 n. 87 (7th Cir. 1984) Garner II applies to Sect. 1983 action where fleeing suspect shot by police on February 2, 1958).

No other circuit has agreed with this ruling and there is need of a Supreme Court ruling to resolve this conflict.

II

THE DECISION OF THE UNITED STATES COURT OF APPEAL FOR THE SIXTH CIRCUIT CONFLICTS WITH THE RULING OF THE UNITED STATES SUPREME COURT IN TENNESSEE v. GARNER, SUPRA IN THAT THE SUPREME COURT APPLIED ITS RULING RETROACTIVE TO THE GARNER CASE AND THE CIRCUIT COURT LIMITS TO PROSPECTIVE APPLICATION ONLY.

The shooting of Edward Garner occurred on October 3,1974; the shooting of Adrian Carter occurred on December 21, 1982, some 8 years later. Yet, the ruling of the Circuit Court denied recovery to the mother of Adrian Carter and other similarly situated victims[2] of constitutional deprivation by prohibiting nonretroactivity of the Supreme Court's decision to pending cases. (App. 149a - 159a). Whereas, the Supreme Court applied its ruling retroactive to the facts of the Garner, supra case and remanded the case for further proceedings consistent with its ruling.

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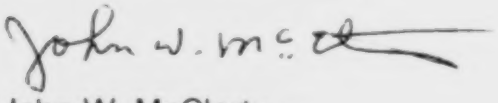
[2]The United States Court of Appeals for the Sixth Circuit has subsequently ruled denying retroactive application of Garner, in Washington v. Starke, slip op. no. 86-1717, decided Aug. 26, 1988, (6th Cir.) the court stated, "We recently held in Carter v. City of Chattanooga" that Garner would only be applied prospectively."

CONCLUSION

Petitioner contends that the ruling in Garner, supra should have been applied retroactively as a matter of law to the facts of her case and she should have been granted judgment.

For all the reasons discussed herein, petitioner Rosa Carter requests that this Supreme Court grant the petition for a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,



John W. McClarty
18 Patten Parkway
Chattanooga, TN 37402
(615) 266-0777

Attorney for Petitioner
Rosa Carter, Administratix
of the Estate of Adrian
Miles Carter, deceased.

Dated: September 24, 1988

CERTIFICATE OF SERVICE

I hearby certify that a copy of the foregoing appendix has ¦een forwarded by U.S. Mail, postage prepaid, on this the 24th day September, 1988, to the following persons:

ugene N. Collins
ity Attorney
)0 Pioneer Bank Building
hattanooga, TN 37402

andall L. Nelson
pecial Counsel
00 Pioneer Bank Building
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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER, Deceased,

Plaintiff CIVIL ACTION NO. _____

vs.

CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation; CHARLES PAT ROSE, as Mayor of the City of Chattanooga, his successors in their official capacities; JOHN P. FRANKLIN, as a member of the Chattanooga City Commission, his successors in their official capacities; WALTER SMARTT, as a member of the Chattanooga City Commission, his successors in their official capacities; PAUL CLARK, as a member of the Chattanooga City Commission, his successors in their official capacities; and JIM EBERLE, as a member of the Chattanooga City Commission, his successors in their official capacities; and LT. PAUL KYLE,

Defendants

COMPLAINT

1.

PRELIMINARY STATEMENT

This is an action at law to redress the deprivation under color of statute, ordinance, regulation, custom, or usage of a right, privilege, and immunity secured to plaintiff's deceased son, Adrian Miles Carter by the Fourteenth Amendment to the Constitution of the United States, and Title 42 United States Code Section 1983.

II.

The jurisdiction of this Court is invoked under 28 U.S.C. 1343 (3) and (4), this being an action authorized by law to redress the deprivation under color of state law, stature, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiff's deceased by the Fourteenth Amendment to the Constitution of the United States and to recover damages under an act of Congress providing for the protection of civil rights.

III.

The matter in controversy exceeds Ten thousand ($10,000.00) Dollars, exclusive of interest and costs as required by Title 28, U.S.C. Section 1331.

IV.

During all times mentioned in this complaint, plaintiff's deceased was a citizen of the United States and resided in the City of Chattanooga, State of Tennessee and plaintiff Rosa Carter is the duly appointed Administratrix of the Estate of her deceased, appointed by the Chancery Court of Hamilton County, Tennessee, Probate Division, and as such is empowered to pursue this action on behalf of her deceased son, Adrian Miles Carter.

V.

DEFENDANTS

At all times mentioned herein, the defendant, Lt. Paul Kyle, was a duly appointed and presently serving as a police officer in the Police Department of the City of Chattanooga, Tennessee.

The defendant, City of Chattanooga, is a municipal corporation, organized and established under the laws of the State of Tennessee.

The defendant, Charles Pat Rose, is the Mayor and Chief Executive Officer of the City of Chattanooga. He is sued in his official capacity.

The defendants, John P. Franklin, Walter Smartt, Jim Eberle and Paul Clark are members of the Chattanooga City Commission. They are sued in their official capacities.

VI.

STATEMENT OF FACTS

On December 21, 1982, the plaintiff's deceased was shot in the back and killed as he attempted to flee from the scene of a non-violence burglary in the City of Chattanooga, Tennessee. The defendant, Lt. Paul Kyle, in his capacity as a police officer in the City of Chattanooga, and wearing the uniform of its police department, shot the plaintiff's deceased in the back with a 357 Magnum pistol without employing any other means to apprehend the plaintiff's deceased as he attempted to flee, causing the plaintiff's deceased to be fatally injured and depriving him of his constitutional rights, privileges and immunities.

The acts of the defendant, Lt. Paul Kyle, were committed with consent of or thereafter the approval of the defendant, City of Chattanooga, its Mayor and Board of Commissioners and in conformity with its policy to allow police officers to arm themselves with 357 Magnum pistols and to shoot to kill persons fleeing from the scene of a non-violent felony.

VII.

CLAIM FOR RELIEF

The defendants, acting under color of authority vested in them by the laws of the State of Tennessee, deprived plaintiff's deceased of the rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States.

The defendant, City of Chattanooga's policy oplaintiff's deceased of the right, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States.

The defendant, City of Chattanooga's policy of allowing its police officers to shoot to kill unarmed persons fleeing from non-violent felonies deprived plaintiff's deceased of the rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States.

The defendant's policy of allowing its police officers to shoot to kill unarmed persons fleeing from non-violent felonies, without first exhausting other means of apprehending the party, deprived plaintiff's deceased of the rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States.

The defendant, Lt. Paul Kyle, in following and implementing the policies of the defendant, City of Chattanooga, deprived

plaintiff's deceased of the rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States and the laws of the United States.

As a direct and proximate result of the aforesaid acts of the defendants, and each of them, plaintiff's deceased was killed and plaintiff was required to incur expenses for burial and other expenses.

WHEREFORE, plaintiff sues the defendants and each of them, jointly and severally, in the amount of $3,000,000.00 for the wrongful death of her deceased and reasonable attorneys' fees, costs and such other relief as the court seems just, proper and equitable.

McCLARTY & WILLIAMS

BY: /S/_____
JOHN W. McCLARTY
Attorney for Plaintiff

/S/_____
RHEUBIN M TAYLOR
Attorney for Plaintiff

STATE OF TENNESSEE:
COUNTY OF HAMILTON:

ROSA CARTER, Administratrix of the Estate of Adrian Miles Carter, being duly sworn, makes oath that the facts stated in the foregoing complaint are true to the best of her knowledge, information and belief; that owing to her poverty, she is unable to bear the costs of the complaint she is about to file, but that she is justly entitled to the relief sought.

/S/ _____
ROSA CARTER

Sworn to and subscribed before me this 21st day of March, 1983

/S/ _____
NOTARY PUBLIC

My Commission Expires: 11-19-84

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

ROSA CARTER, Administratrix, of the ESTATE OF ADRIAN MILES CARTER, Deceased,

Plaintiff,

vs.

CITY OF CHATTANOOGA, TENNESSEE, et al,

Defendants.

PRELIMINARY PRETRIAL ORDER

1. INTRODUCTION: This is an action for deprivation of civil rights under 42 U.S.C. 1983. Present representing the plaintiff was John McClarty. Present representing the defendants were Gary Lander and Randall Nelson. Pursuant to Rule 16 of the Federal Rules of Civil Procedure and the Rules of this Court, the following action was taken.

2. JURISDICTION: In this case, the subject matter jurisdiction of the Court has been invoked pursuant to 28 U.S.C. 1343, and is not in dispute.

3. PRETRIAL SCHEDULE: (a) Joinder of parties and amendment of pleadings: The parties do not wish to join any additional parties to this lawsuit. Any technical amendments to the pleadings or amendments based upon presently known facts should be made by October 14, 1983.

(b) Motions in abatement: The defendants do not wish to file any motions in abatement.

(c) Preliminary witness lists: The parties will file their preliminary witness lists on or before September 26, 1983.

(d) Final witness lists: The parties will file their final witness lists on or before December 24, 1983.

(e) Discovery: Discovery in this case is to be completed by December 31, 1983.

4. PREPARATION OF ISSUES FOR TRIAL:

(a) Stipulations and admissions: The parties shall, if possible, file a set of stipulated facts regarding all matters not in genuine dispute no later than the date of the final pretrial conference.

(b) Motions in limine: If either party expects to file a motion in limine, it must be filed no later than (10) days prior to the date upon which the final pretrial conference is to be held.

(c) Exhibits: The parties will exchange lists of the exhibits they intend to use at trial no later than December 31, 1983. Any exhibit so listed shall be open for inspection and copying by opposing counsel. The parties shall have five (5) days thereafter within which to object to the authenticity of any exhibit. The authenticity of any exhibit not objected to will be taken as stipulated. The parties will reserve the right to object at trial on any other ground, and also reserve the right to cross-examine as to any exhibit.

5. FINAL PRETRIAL CONFERENCE: A final pretrial conference will be held in this case on January 9, 1984, at 8:30 o'clock a.m. before the United States District Judge.

6. TRIAL: The trial of this case will be held before a six person jury upon January 30, 1984. The trial is expected to last three (3) days. The possibility of settlement prior to trial is considered poor.

ENTER:

(S)

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER	)	
Plaintiff	)	CIV. NO. 1-83-139
vs.	)	
CITY OF CHATTANOOGA TENNESSEE, et al	)	
Defendants	)	

MOTION FOR PARTIAL SUMMARY JUDGMENT

The plaintiff, Rosa Carter, Administratrix of the Estate of Adrian Miles Carter, deceased, moves the Court pursuant to Rule 56, Federal Rules of Civil Procedure, for partial summary judgment on the issue of the municipal defendant's liability for the wrongful death of her deceased son.

Plaintiff would say unto the court that the material facts regarding the municipal defendant's liability are not disputed and are contained in the Answer to Complaint; Answer to Plaintiff's Interrogatories; Defendants' Brief in support of their motion to continue trial date; and the Defendants' Answer to the amended Complaint, all of which were filed by the defendants with the Court.

Plaintiff asserts that as a matter of law, she is entitled to a judgment in her favor on the issue of the municipal defendant's liability for the wrongful death of her son.

In support of her motion, plaintiff relies on the attached memorandum.

WHEREFORE, plaintiff prays that the Court will grant her a partial summary judgment resolving the issue of the municipal defendant's liability in this cause.

Respectfully submitted,

/S/

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Attorney for Plaintiff
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Chattanooga, TN 37402

/S/

RHEUBIN M. TAYLOR
Attorney for Plaintiff
615 Lindsay Street
Chattanooga, TN 37402

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratix of the ESTATE OF ADRIAN MILES CARTER, Deceased, Plaintiff vs. CITY OF CHATTANOOGA, TENNESSEE, et al., Defendants	CIVIL ACTION NO. 1-83-139

CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant City of Chattanooga, Tennessee, by its undersigned counsel, moves the Court for an order pursuant to Rule 56, Fed.R.Civ.Proc., granting it summary judgment and dismissing this action on the grounds that the pleadings, answers to interrogatories, affidavit of counsel, and exhibits demonstrate that it is entitled to judgment as a matter of law sustaining the following defenses pleaded in its Answers:

1. These defendants alternatively aver that the policies, customs, and usages of the City regarding the use of force for the apprehension of a fleeing felon derive from and is consistent and co-extensive with the common law of the State of Tennessee as codified in T.C.A. 40-7-108. They further aver that such common law and statute, and hence, the City's policies, customs and usages derived therefrom have been upheld as constitutional as applied to the circumstances alleged in the instant case and, therefore, such policies, customs, or usages do not violate clearly established statutory and constitutional rights of which reasonable persons would have known at the time such policies, customs or usages were adopted or promulgated. These defendants therefore are entitled to a good faith immunity from the liability asserted in the Complaint. Answer, May 13, 1983 VIII, pp. 5-6

2. Defendant City of Chattanooga for its separate defenses states that it cannot be held liable for the damages claimed on the ground that the injuries sustained by the decedent were not proximately caused or directly related to an unconstitutional ordinance, policy or custom of the City.

   City avers that it may not be held liable for injuries inflicted pursuant to policies, customs, or usages authorized by and derived from the common law and statutes of the State of Tennessee as alleged in the Complaint when such policies, customs, usages and the authorizing state common law and statutes have been upheld as constitutional as applied to the actions of a police officer as averred in this Answer. Answer, May 13, 1983, X, p.7.

3. Defendants deny that the Fourth Amendment rights of plaintiffs's deceased were violated. Defendants specifically aver that any and all rights of the plaintiff's deceased protected by the Fourth Amendment to the United States Constitution as against persons acting under color of state law are included within and have been made applicable to the states pursuant to the provisions of the due process clause of the Fourteenth Amendment to the United States Constitution. Accordingly, defendants aver that the decisions of the United States District Courts in Tennessee and the United States Court of Appeals for the Sixth Circuit with review denied by the United States Supreme Court upholding the common law of the State of Tennessee as codified in T.C.A. 40-7-108, upon which the City's policies, customs and usage are derived with respect to the use of deadly force, are the controlling authority. Said decisions upheld the common law and the statute as not depriving citizens of their rights to substantive or procedural due process as guaranteed by the Fourteenth Amendment and thus included consideration of all rights arising under the Fourth Amendment as previously declared applicable to and against the states as elements of substantive and procedural due process guaranteed by the Fourteenth Amendment. Answer to Amended Complaint, October 19, 1983, III.

4 .Defendants further specifically aver that any intervening decision of a court of competent jurisdiction rendered after December 21, 1982, and announcing a new rule of liability may not be retroactively applied to the facts or parties of any pending case other than the case in which said decision was announced. Answer to Amended Complaint, October 19, 1983, IV.

On the bases of these defenses, the Complaint fails to state a claim upon which relief may be granted.

An Affidavit of Counsel and a Brief have been submitted of even date in support of this Motion.

EUGENE N. COLLINS, CITY ATTORNEY

By: /S/ _____

GARY D. LANDER
RANDALL L. NELSON
Attorneys for Defendant City
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratix of the ESTATE OF ADRIAN MILES CARTER, Deceased, Plaintiff	
vs.	CIVIL ACTION NO. 1-83-139
CITY OF CHATTANOOGA, TENNESSEE,) et al., Defendants	
STATE OF TENNESSEE COUNTY OF HAMILTON	

AFFIDAVIT

Gary D. Lander, being first duly sworn for his Affidavit, states as follows upon his own knowledge:

1. He is and has been continuously retained as Special Counsel to the Office of the City Attorney since September, 1972.

2. He is attorney for the defendants in this litigation. As such, he became aware of the pendency of Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983) (Garner II) when he began to research the applicable law upon the filing of this litigation on March 29, 1983. As part of his inquiries, he arranged to be notified by the Clerk of the United States Court of Appeals for the Sixth Circuit of the release of the Court's Opinion in Garner II

and was so notified on June 16, 1983, by telephone.

3. Before receipt of a copy of the Court's Opinion, the Office of the City attorney on June 16, 1983, advised the Commissioner of the Department of Fire and Police to instruct all police officers not to use any deadly force against a fleeing felony suspect except in self-defense or defense of others. The Commissioner issued a written general order on June 16, 1983, to the Chief of Police directing implementation of this instruction.

4. On June 20, 1983, the City Attorney wrote a letter to the Commissioner, true copy attached as Exhibit A hereto, summarizing the holding of Garner II.

5. On June 27, 1983, Randall L. Nelson, also Special Counsel to the City Attorney and attorney for defendants in this case, orally instructed all three shifts of the officers of the Chattanooga Police Department about the new deadly force policy as stated in Garner II and as summarized in the City Attorney's letter.

6. Copies of the City's policies regarding use of force and deadly force identified in City's Answer to Interrogatories, No. 19, as contained in the Police Manual in effect on December 21, 1982, are attached as Collective Exhibit B hereto. These policies are consistent with and are based upon the common law of Tennessee as codified in T.C.A. 40-7-108 as interpreted by Tennessee courts, the federal courts in this state and the United States Court of Appeals for the Sixth Circuit.

FURTHER AFFIANT SAITH NOT.

(S) _____
GARY D. LANDER

/S/ _____
Sworn to and subscribed before me
this the 4th day of January, 1984.

/S/_____
NOTARY PUBLIC

My Commission Expires: 2/24/85

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratix of the ESTATE OF ADRIAN MILES CARTER, Deceased, Plaintiff vs. CITY OF CHATTANOOGA, TENNESSEE, et al., Defendants	CIVIL ACTION NO. 1-83-139

MOTION FOR SUMMARY JUDGMENT

Defendant Paul E. Kyle, by his undersigned counsel, moves the Court for an order pursuant to Rule 56, Fed.R.Civ.Proc., granting him summary judgment by sustaining the following defenses set forth in his Answer:

IX.

Defendant Kyle, for his separate and additional defenses, states that, at the time and place alleged in the Complaint, the decedent was fleeing from the scene of a second-degree burglary committed by him, and that defendant gave notice of his intention to arrest the decedent, who then continued to flee and that the decedent would have escaped apprehension if defendant Kyle had not fired upon him. Defendant Kyle avers that he acted consistently with and in good faith reliance upon the lawful policies of the City and within the privilege afforded by the terms of T.C.A. 40-7-108, and that he is therefore entitled to immunity from the liability averred in the Complaint.

Defendant Kyle further avers that, the constitutionality of the aforementioned statute having been upheld on several occasions

by United States District Courts in Tennessee and the United States Court of Appeals for the Sixth Circuit, review denied by the United States Supreme Court, in cases indistinguishable factually from the case at bar, he is entitled to a good faith immunity from the liability asserted in the Complaint, even if said statue is subsequently declared to be unconstitutional on its face or as applied to such facts.

Defendant Kyle further avers that, at the time and place alleged in the Complaint, he had no other reasonable means available to him to apprehend the decedent and that he was therefore privileged under state law to use force employed to apprehend the decedent.

Defendant submits in support of his Motion, his Affidavit, the Affidavit of Sergeant Helen A. Cooper, the Affidavit of Gary D. Lander and asserts that, on the basis thereof, as well as the pleadings and Answers to Interrogatories, there is no genuine issue of material fact to be tried and he is entitled to judgment of dismissal as a matter of law.

EUGENE N. COLLINS, CITY ATTORNEY

By: /S/ _____

GARY D. LANDER
RANDALL L. NELSON
400 Pioneer Bank Building
Chattanooga, Tennessee 37402
(615) 756-2291

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratix of the ESTATE OF ADRIAN MILES CARTER, Deceased, Plaintiff	
vs.	CIVIL ACTION NO. 1-83-139
CITY OF CHATTANOOGA, TENNESSEE, et al., Defendants	
STATE OF TENNESSEE COUNTY OF HAMILTON	

AFFIDAVIT

Paul E. Kyle, being first duly sworn, states as follows on the basis of personal knowledge:

1. He is and has been continuously for 24 years a sworn police officer of the City of Chattanooga, Tennessee, now holding the rank of lieutenant.

2. On December 21, 1982, he was assigned to duties in the patrol division, David Sector, on the day shift.

3. On December 21, 1982, while in his patrol car at approximately 1:30 p.m. he heard the Chattanooga Police department radio dispatcher advise that he had received a Sonitrol burglar alarm indicating unauthorized entry of premises at 915 Vine street. At this point he was located at the intersection of Market

and Newby Streets. At this time in December, 1982, the police had been receiving a large number of burglary complaints in the Vine Street area of David Sector.

4. He then responded to the call by driving to 915 Vine Street. As he arrived, he heard Sergeant Helen Cooper state over the radio that she had observed a broken window on the west side of the building. As he arrived, he saw Sergeant Cooper and Officer Lon Eilders already on the scene.

5. After stopping and leaving his vehicle, he approached the front of the house, which is situated on the north side of Vine Street, and was met by Sergeant Helen Cooper, who approached and advised him of a broken window on the west side of the house at ground level. He proceeded to the west side of the house and observed the broken and raised window. He then instructed Officer Eilders to stand watch on the west side of the house, adding that he would then take up a position to the rear of the house. Officer Eilders then went to the northwest corner of the house and Sergeant Cooper to the southwest corner as he moved to the east side of the house, intending to position himself at the rear.

6. He then went up on a porch on the east side of the house and, as he was walking up the steps and looking toward a side door on the east side of the house, he observed a black male standing in the doorway. When the black male saw Lieutenant Kyle, he turned and ran back into the house, shutting the door. He then tried the screen door and found that it was locked and immediately notified the dispatcher by radio to send more cars to cover a burglary in progress.

7. He then moved back to the side of the house and started to survey the building, knowing that one or more persons were inside.

8. Suddenly, he observed two black males jump from the overhanging roof of the porch on the east side of the house down to the ground from the second floor.

9. One of the parties landed to the rear near where Officer Eilders was stationed. He heard Officer Eilders order the parties to halt. The second party ran into bushes to the east side of the house, up a gradual bank sloping upward to the north from Vine Street. As this party ran, Lieutenant Kyle could not see Officer Eilders. He hollered at the party, ordering him to halt several times, and then fired two shots in his direction. The party then fell and he approached the party, seeing that he was the deceased Adrian Carter.

10. At the time of the occurrence and under the circumstances disclosed, it did not appear to Lieutenant Kyle that there was any other reasonable way of apprehending the party at whom he had shot. When he fired at this party, he was unable to see Officer Eilders or the other suspect, and was unaware that the other suspect had been captured. The deceased, Adrian Carter, would have escaped apprehension at the scene had he not fired.

11. At the time and place of the events described herein, Lieutenant Kyle was dressed in his police uniform, wearing a badge, and was carrying an authorized weapon loaded with authorized ammunition.

12. At the time and place of the incident described herein, Lieutenant Kyle believed in good faith that the laws of the State of Tennessee and the policies of the City of Chattanooga, Tennessee, authorized him to use force, including deadly force, to capture a fleeing felon who refuses to halt after being warned to halt and surrender if there is not other reasonable means to effect his arrest.

13. To the best of his knowledge, information and belief, daylight burglary of a residence was a felony under the laws of the State of Tennessee, and was known to him to be a felony under the laws of the State of Tennessee on December 21, 1982.

14. On the basis of the Sonitrol alarm, the broken and raised window observed by him at the scene, the appearance and conduct of the deceased and the other party when they first observed Lieutenant Kyle on the east side of the house, and their conduct thereafter in jumping from the second story and attempting to escape, he had probable cause to believe that the deceased Adrian Carter and the other party were in the process of committing a felony when he observed them, and that, having been warned by both him and Officer Eilders to halt and refusing to do so, he was legally justified in using the force employed under all of the circumstances to effect the arrest of the deceased.

FURTHER AFFIANT SAITH NOT.

/S/_____
PAUL E. KYLE

Sworn to and subscribed before
me this the 6th day of
January, 1984.

/S/ _____
NOTARY PUBLIC

My Commission Expires: 3/29/84

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER, Deceased, Plaintiff, vs. CITY OF CHATTANOOGA, TENNESSEE, et al., Defendants.	CIV-1-83-139

MEMORANDUM

This is an action under 42 U.S.C. 1983 to recover damages allegedly resulting from a deprivation of plaintiff's decedent's civil rights under the Fourth and Fourteenth Amendments to the United States Constitution. The subject matter jurisdiction of this court has been involked under 28 U.S.C. 1343(a) (3), and is not in dispute. This action is before the Court upon the following motions:

(1) Plaintiff's motion for partial summary judgment (Court File #14); (2) defendant City of Chattanooga's motion for summary judgment (Court File #15); and (3) defendant Paul Kyle's motion for summary judgment (Court File #18).

I.

The facts relevant to the disposition of these motions are not in dispute.[1] At about 1:30 on the afternoon of December 21, 1982, the plaintiff's decedent, Adrian Miles Carter, was discovered in the act of burglarizing a house at 915 Vine Street, in Chattanooga, Tennessee. Defendant Kyle and two other police officers of Chattanooga arrived at the house after having been notified that a silent burglar alarm had indicated an unauthorized entry into the house. Upon seeing the police, Carter attempted to flee, was ordered to halt by Lieutenant Kyle, and, after failing to do so, was shot by Kyle. Carter later died at the hospital. To Kyle's knowledge, Carter was unarmed, had made no threats of harm to any police officer or any other person, and was attempting to flee from a daylight burglary of a residence.

Kyle was acting within the course and scope of his employment as a police officer of the City of Chattanooga at the time this incident occurred. The defendant Chattanooga, a municipal corporation organized under the laws of Tennessee, maintained written policies in the form of general orders in its police manual governing the use of force in the apprehension of fleeing felony suspects. One section of the manual contains by reference the provisions of a Tennessee statute, Tenn. Code Ann. 40-7-108, which provides:

> Resistance to officer. -- If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

According to Lt. Kyle's affidavit, which is uncontroverted, he did not believe there was any other way of apprehending Carter, and that if the measures which were taken had not been taken, Carter would have escaped. Kyle further avers that he knew that the conduct in which Carter had been engaged was a felony under the laws of Tennessee. Finally, Kyle asserts that he believed in good faith that he was authorized to use deadly force to apprehend a fleeing felon by the laws of Tennessee and the policies of Chattanooga contained in its police manual.

As noted earlier, the facts underlying this action occurred on December 21, 1982. The action was filed on March 29, 1983. On June 16, 1983, the statute relied upon by Kyle was held to be unconstitutional as an unreasonable seizure under the Fourth Amendment to the Constitution of the United States by the United States Court of Appeals for the Sixth Circuit. Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983). On September 26, 1983, the Court denied applications for rehearing and rehearing en banc. The case is now before the Supreme Court of the United States on appeal. U.S. appeals docketed, No. 83-1035 (December 21, 1983) and No. 83-1070 (December 27, 1983).

II.

A.

At this point, it would be useful to set out in some detail the legal theories upon which the plaintiff and defendants are relying. The plaintiff asserts that:

> The authorized use by the defendant police officer of deadly force against a non-violent, unarmed fleeing felon is a violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution and amounts to an unnecessarily severe and excessive, and therefore, unreasonable method of seizure of the person in violation of the Fourth Amendment to the U.S. Constitution.
> . . .

(Final Pretrial Order, (2) (b)).

The defendant City of Chattanooga argues in defense that (1) the decision in Garner v. Memphis Police Department, supra, should not be retroactively applied and that, even if it were to be retroactively applied, the City is entitled to good faith immunity. The individual defendant claims a good faith immunity.

The City does authorize the use of deadly force in certain situations. The City's Police Manual, Manual Order No. 1.05, Use of Force, provides:

> 6. By statute, an officer is authorized the use of deadly force when it reasonably appears necessary to prevent the escape of a felon. Such force may only be exercised when all reasonable alternatives have been exhausted and must be based only on facts or what reasonably appear to be the facts known to the officer at the moment he shoots.

The statute referred to in the order is Tenn. Code Ann. 40-7-108, quoted above. It is beyond dispute that the City has relied on this statute in formulating its policy regarding the use of deadly force in making an arrest.

B.

In light of the nature of the City's and Lieutenant Kyle's defenses, it is necessary to outline the development of the law in this area. The constitutionality of 40-7-108 (then 40-808) was first addressed in Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971), in which a three-judge District Court held that the statute was facially valid. In that case, the plaintiffs had attacked the statute as violative of the Eighth Amendment, of the Fourteenth Amendment's equal protection clause, and as being vague and overbroad. In interpreting the meaning of the statute, the Court stated:

> It is agreed by all parties that, as construed by the Tennessee courts, this statute means, in the present context, that an officer may use force that may result in death in preventing the escape of a person that he is attempting to arrest if (1) he reasonably believes that the person has committed a felony and (2) he notifies the person that he intends to arrest him and (3) he reasonably believes that no means less than such force will prevent the escape. The parties also agree that, so constructed, the statute merely states the common law.

Id. at 1074-75 (citing Johnson v. State, 173 Tenn. 134, 114 S.W. 2d 819 (1938); Scarbrough v. State, 168 Tenn. 106, 76 S.W. 2d 106 (1934); Love v. Bass, 145 Tenn. 522, 238 S.W.94 (1921); Reneau v. State, 70 Tenn. 720 (1879).

In Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), cert. denied, 409 U.S. 1114, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973), the Court held that the findings of the District Court that the officers were justified in using deadly force to apprehend two fleeing felons was not clearly erroneous. Although this case is useful primarily in support of the proposition that the officers/defendants were entitled to assume the constitutionality of 40-7-108, and thus were immune from liability, Id. at 426, the Court also assumed the validity of the statute based upon the opinion in Cunningham v. Ellington, supra.[2] Id.

Four years later, the Court in Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976) held that the statute, although not controlling on the issue of immunity, should inform the judgment of a Federal Court "in determining the federal law to be fashioned to determine the liability of the defendants." Id. at 694. There is no constitutional analysis in this case, but the Court reaffirmed its holding in Beech that the officers were entitled to rely upon the statute "that relieved (them) from liability for the particular acts performed in his official capacity." Id.

The next year, the Sixth Circuit decided Wiley v. Memphis Police Department, 548 F.2d 1247 (6th Cir.), cert. denied, 434 U.S. 822, 98 S. Ct. 65, 54 L.Ed.2d 78 (1977). In that case, the Court, through Judge Weick, stated that the constitutionality of 40-7-108 had been previously settled by the decision in Cunningham v. Ellington, supra, and Beech v. Melancon, supra. Id. at 1250-51. The Court went on to criticize a decision of the Eighth Circuit that had held a similar statute unconstitutional. Id. at 1252. Further, the Court reiterated its earlier holdings regarding the officers' ability to rely on the statute.[3] Id. at 1253.

The penultimate chapter in this history concerns the first appeal in Garner v. Memphis Police Department, 600 F.2d 52 (6th Cir. 1979) (Garner I). The District Court had granted judgment for the individual officers on the basis of the qualified immunity defense, and had dismissed the action against the City on the basis of Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Before the appeal was decided, the Supreme Court handed down its decision in Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), which held that a municipality is a "person" subject to suit under 42 U.S.C. 1983. The Sixth Circuit affirmed the judgment as to the officers, holding that "an individual officer has a qualified privilege or immunity from liability for constitutional claims based on good faith performance of his duties in accordance with statutory or

administrative authority... ." Id. at 54; accord Harlow v. Fitzgerald, U.S. __, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). As to the dismissal of the claim against the City, the Court reversed on the basis of Monell, and remarked, almost in passing, that the Court's "previous decisions do not establish the constitutionality of Tenn. Code Ann. 40-808 (now 40-7-108)... ." 600 F.2d at 54.

After the remand in Garner I, the District Court held that the statute was constitutional. On appeal, the Sixth Circuit disagreed, holding that the statute was "unconstitutional because it authorizes unnecessarily severe and excessive, and therefore unreasonable, methods of seizure of the person under the Fourth and Fourteenth Amendments." Garner v. Memphis Police Department, 710 F. 2d 240, 241 (6th Cir. 1983) (Garner II).

III.

A.

The parties agree that Lieutenant Kyle is entitled to assert the defense of qualified immunity based upon his good faith reliance upon the statute. The standard to be used in assessing a defendant's liability when asserting a defense of qualified immunity was recently modified by the United States Supreme Court in Harlow v. Fitzgerald, __ U.S. __, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982), in which the Court stated:

> (G)overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., 73 L.Ed.2d at 410. Although Harlow was an action under the Constitution against a federal official, the same standard applies to damages suits against state officials under 42 U.S.C. 1983. Id., 73 L.Ed.2d at 410 n. 30.

The plaintiff argues that the questions of Kyle's good faith and whether he complied with the statute are issues of fact that must be submitted to a jury. It is true that the assertion of qualified immunity raises issues normally not appropriate for summary judgment, see Casto, Innovations in the Defense of Official Immunity under Section 1983, 47 Tenn. L. Rev. 47, 53 and n. 28 (1979), but as the Supreme Court said in Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L.Ed.2d 895 (1978):

> (D)amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. ... (F)irm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Id. at 507-08 (quoted in Harlow v. Fitzgerald, supra, 73 L.Ed.2d at 404). This is not to say that this is a frivolous lawsuit: it is a most serious case, the underlying facts of which are tragic. It is to say, however, that when confronted with a motion for summary

judgment supported by affidavits as thorough as those filed by the defendants, the plaintiff may not simply assert that genuine issues of fact remain for trial; she must produce evidence showing that there is a genuine issue of material fact, or show, under Rule 56(f), "that there are reasons why (s)he cannot presently introduce affidavits containing facts justifying (her) opposition" to the motion. 10A C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE AND PROCEDURE 2739 at 523 (1983). In this case, the plaintiff has done neither. There is, therefore, no genuine issue of material fact regarding defendant Kyle's defense of qualified immunity, and he is entitled to a judgment as a matter of law.

B.

The defendant City has asserted essentially two defenses: First, that the decision in Garner II should not be retroactively applied so as to make the City liable for its pre-Garner II actions; and second, that even if Garner II is to be applied retroactively, the City is qualifiedly immune from liability because of its good faith reliance on the statute in formulating its policies. The Sixth Circuit answered the second contention in Garner II, but not the first.

Relying upon the Supreme Court's opinion in Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980), which held that a municipality may not claim immunity based on the good faith of its agents, the Garner II Court held that "there is no good faith immunity for municipalities under 1983." 710 F.2d at 248. With regard to the City's non-retroactivity

defense, it has engaged in extensive analysis in arguing that it should not be held liable. The Court is of the opinion, however, that it is not necessary to engage in the kind of analysis urged by the City.[4] This is so for two reasons.

In reaching its decision in Garner II, the Sixth Circuit necessarily took three distinct analytical steps; (1) the statute was found unconstitutional; (2) the decision was to be retroactively applied; and (3) the City had no qualified immunity. The second step in the analysis was not mentioned by the Court, but it is implicit in the decision because it is necessary to reach the immunity question only if the City's policies were found to be unconstitutional at the time the events giving rise to the lawsuit occurred. If the policies (or the statute) became unconstitutional only when the court held it so, there would be no need to address the immunity question. The Court is of the opinion, therefore, that the Sixth Circuit in Garner II implicitly held that its decision was to be applied retroactively.

There is another reason that the Court is of the opinion that Garner II should be retroactively applied. A finding of non-retroactivity would simply be granting the City, in a manner of speaking, a "back-door" good faith immunity, which result the Sixth Circuit has expressly foreclosed. That is to say, if this Court were to hold that Garner II should not be applied retroactively, it would

be holding, in effect, that until the decision in Garner II was rendered, 40-7-108- was constitutional, and the City was entitled to rely upon it in formulating its policies. The Sixth Circuit's opinion cannot reasonably be so interpreted.

For all of these reasons, therefore, the Court is of the opinion that the decision in Garner II should be retroactively applied to the City in this case and, therefore, that the City's motion for summary judgment should be overruled.

The City's policies at issue here were expressly based upon Tenn. Code Ann. 40-7-108, which was found to be unconstitutional as applied in Garner II. The Court found that the use of deadly force to apprehend a fleeing felon was constitutional only in the following circumstances:

> Before taking the drastic measure of using deadly force as a last resort against a fleeing suspect, officers should have probable cause to believe not simply that the suspect has committed some felony. They should have probable cause also to believe that the suspect poses a threat to the safety of the officers or a danger to the community if left at large. The officers may be justified in using deadly force if the suspect has committed a violent crime or if they have probable cause to believe that he is armed or that he will endanger the physical safety of others if not captured.

710 F.2d at 246. The Court also quoted approvingly from the American Law Institute's Model Penal Code, which states:

> The use of deadly force is not justifiable...unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm is his apprehension is delayed.

Id. at 247; Model Penal Code 3.07(2) (b) (Proposed Official Draft, 1962).

The Court does not believe that the record in this case is clear enough, however, to grant plaintiff's motion for summary judgment. The City's policy on the use of deadly force is unquestionably unconstitutional under Garner v. Memphis Police Department, supra. However, whether the actions of Kyle satisfied the standards quoted above involve issues of fact which should be submitted to a jury, and accordingly, the plaintiff's motion will be overruled.

An appropriate Order will enter.

/S/_____
UNITED STATES DISTRICT JUDGE

[1]The statement of undisputed facts is taken from the stipulated facts as stated in the Final Pretrial Order (Court File #21), and from the uncontroverted affidavits of Lt. Paul Kyle (Court File #19) and Sgt. Helen Cooper (Court File #20). See Fed. R. Civ. P. 56(e).

[2]Circuit Judge McCree, concurring, would have reserved judgment on the constitutionality of the statute in this case. Id., (McCree, J., concurring).

[3]Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), vacated as moot sub nom. Ashcroft v. Mattis, 431 U.S. 171, 52 L.Ed.2d 219 (1977).

[4]The Court notes in passing, without so holding, that many of the factors mentioned by the Court in Garner II in its discussion of the City's qualified immunity would be relevant in standard retroactivity analysis under the rule of Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296, 306 (1971); see also Northern Pipeline Construction Co. v. Marathon Pipeline Co., __ U.S. __, 102 S. Ct. __, 73 L.Ed.2d 598, 525-26 (1982); United States v. Johnson, __ U.S. __, 102 S.Ct. _, 73 L.Ed.2d 202, 222-23 (1982); Schaefer, Prospective Rulings: Two Perspectives, 1982 Sup. Ct. Rev. 1.

IN THE UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER, Deceased,

Plaintiff,

vs.

CITY OF CHATTANOOGA, TENNESSEE, et al.,

Defendants.

CIV-1-83-139

ORDER

This action under 42 U.S.C. 1983 is before the Court upon various motions. In accordance with the Memorandum opinion accompanying this Order, it is ORDERED:

(1) That the defendant Kyle's motion for summary judgment (Court File #18) be granted;

(2) That the defendant City's motion for summary judgment (Court File #15) be overruled; and

(3) That the plaintiff's motion for partial summary judgment (Court File #14) be overruled.

ENTER:

/S/

UNITED STATES DISTRICT JUDGE

CIV 31
REV 7/82

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	Eastern District of TN., Southern Div.
CASE TITLE ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER, Deceased	DOCKET NUMBER CIV-1-83-139
	NAME OF JUDGE
CITY OF CHATTANOOGA, TENNESSEE, a Municipal Corporation	THE HONORABLE H. TED MILBURN

[x] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant, City of Chattanooga, Tennessee, recover of the plaintiff, Rosa Carter, Administratrix of the Estate of Adrian Miles Carter, Deceased, his costs of action.

Dated at Chattanooga, Tennessee, this 31st day of January, 1984.

Filed _____
Ent'd Order Bk__p
Karl D. Saulpaw, Jr., Clerk
By _____
Deputy Clerk

(Copy "Attest...")

CLERK	DATE
KARL D. SAULPAW, JR.	1/31/84
(BY) DEPUTY CLERK /S/ Nancy Anderson	

IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES Plaintiff vs. CITY OF CHATTANOOGA, TENNESSEE et al Defendants	CIVIL ACTION NO. 1-83-139

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE MOTION FOR NEW TRIAL

Comes now the plaintiff, Rosa Carter, Administratrix of the Estate of Adrian Miles Carter, Deceased, pursuant to Rule 50 (b) Federal Rules of Civil Procedure and moves the Court to grant her a judgment against the defendant, City of Chattanooga, notwithstanding the verdict returned by the jury.

Plaintiff would show unto the Court that, at the close of all the proof in the trial of this case, she moved the Court to grant her a direct verdict on the issue of liability. (Copy of motion attached). That this motion was based upon the law as set out in the case of Garner v. Memphis Police Department, 710 F. 2d 250 (1983), which held:

"... Before taking the drastic measure of using deadly force as a last resort against a fleeing suspect, officers should have probable cause to believe not simply that the suspect has committed some felony. They should have probable cause also to believe that the suspect poses a threat to the safety of the officers or a danger to the community if left at large. The officers may be justified in using deadly force if the suspect has committed a violent crime or if they have probable cause to believe that he is armed or that he will endanger the physical safety of others if not captured."

That the evidence presented at trial did not show that the officer had probable cause on any of these points, the evidence did, however, show and it was stipulated by the parties that the officer's conduct at the time of the shooting was in conformity with the policy of the defendant and the officer testified that he relied upon the City's policy in shooting because it was his understanding that he could shoot a fleeing felon.

That, this being the case, the shooting of plaintiff's deceased by the officer was not in conformity with the ruling of the Court in the Garner case and that the defendant should be held liable as a matter of law because it authorized the officer's action.

Therefore, the plaintiff prays that the Court would grant her judgment notwithstanding the jury's verdict and would set a hearing for the determination of damages.

In the alternative, the plaintiff moves the Court pursuant to Rule 59, Federal Rules of Civil Procedure to grant her a new trial in this cause.

As grounds for new trial, the plaintiff would show unto the Court that:

1. The verdict returned by the jury is against the clear weight of the evidence presented at trial.

2. The evidence presented at trial is insufficient to support the jury's verdict.

3. The Court erred in overruling the plaintiff's motion for summary judgment on the issue of liability.

4. The jury refused to follow the Court's instructions and considered matters relating to the deceased violating the Constitution as a contract and his rejecting due process of law, both of which were not matters applicable to these proceedings and apart from the Court's instructions. In support of this allegation, the plaintiff attaches a copy of a newspaper interview with the jury foreperson.

WHEREFORE, plaintiff moves the court to grant a hearing on this motion, at the conclusion of which that the Court grant her a new trial in this cause. In addition, if the Court feels that the plaintiff is not entitled to a new trial after a hearing on this cause, the plaintiff moves the Court to allow her to examine the jurors under court supervision regarding the allegation of their failure to follow the Court's instructions.

/S/_____
JOHN W. McCLARTY
Attorney for Plaintiff
18 Patten Parkway
Chattanooga, TN 37402

/S/_____
RHEUBIN M. TAYLOR
Attorney for Plaintiff
615 Lindsay Street
Chattanooga, TN 37402

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

ROSA CARTER, Administratrix of the
ESTATE OF ADRIAN MILES CARTER, Deceased,

Plaintiff,

vs.

CIVIL ACTION

NO. 1-83-139

CITY OF CHATTANOOGA, TENNESSEE, a municipal corporation,

Defendant.

Chattanooga, Tennessee
January 31, 1984

PLAINTIFF'S MOTION FOR DIRECTED VERDICT

RICHARD SMITH
OFFICIAL COURT REPORTER
100 U.S. POST OFFICE AND COURTHOUSE
P.O. BOX 6127
CHATTANOOGA, TENNESSEE 37401

Mr. McClarty: I'm moving at this time for a motion for directed verdict on the issue of liability.

Our basis for this motion, your Honor, is that the law as set out under the Garner decision requiring the officer to not only have probable cause that a felony had been committed, but requiring an officer to have probable cause that the suspect is a danger to himself or threat to others or a danger to the community, or that the offense was a violent offense or that he believes that the suspect is armed, or that he believes that the suspect would endanger the safety of others if not captured.

We feel in this case that no evidence has been presented to show that the officer had probable cause on these points and we feel that, under the Garner ruling, we are entitled to a directed verdict on the issue of liability.

And I quote from the officer's testimony. He said, "I shot because he was a burglar. He was a fleeing felon and he failed to yield to halt." And he shot.

There was no question that he did shoot. The bullet hit and the young man later died. And we feel as to, the policy of the City has been introduced. There's been no question and the Commissioner testified that the conduct of the officer was in conformity with the policy of the City and the officer testified he relied upon the City policy in shooting, because it was his understanding that he could shoot a fleeing felon.

And we feel, based upon this, your Honor, they should be held liable as a matter of law in this case.

SUBSTITUTE OFFICIAL REPORTER'S CERTIFICATE

I, Dorothy D. Banks, Substitute Official Court Reporter for the United States District Court, for the Eastern District of Tennessee, Southern Division, at Chattanooga, Tennessee, do hereby certify that I reported in machine shorthand the proceedings had in open court in the above-styled case on January 31, 1984; and that the foregoing partial transcript was typed by me and is a true and correct transcript of said partial transcript.

This the 3rd day of February, 1984.

/S/_____
Dorothy D. Banks, Substitute
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER, Deceased,	)	
Plaintiff,	)	
vs.	)	CIV-1-83-139
CITY OF CHATTANOOGA, TENNESSEE,	)	
Defendant,	)	

MEMORANDUM AND ORDER

This cause is presently before the Court upon the plaintiff's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial.

With regard to the motion for judgment notwithstanding the verdict, the Court was of the opinion at the end of the plaintiff's proof and at the conclusion of all proof that sufficient evidence had been introduced to raise questions of fact for determination by the jury as to whether or not the use of deadly force by the Chattanooga police officer on the occasion giving rise to the death of Adrian Miles Carter was or was not constitutional under the guidelines set out in GARNER V. MEMPHIS POLICE

DEPARTMENT, 710 F.2d 250 (6th Cir. 1983). Accordingly, the motions for a directed verdict were overruled. Thus, under Morelock v. NCR CORP., 586 F. 2d 1096, 1104 (6th Cir. 1978), this Court in considering plaintiff's motion for judgment n.o.v.

> may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from the evidence all reasonable inferences in his favor...

After considering all of the evidence presented at the trial of this cause, the Court is not of the opinion that the evidence points so strongly in favor of the movant that reasonable minds could not come to a different conclusion. Therefore, the Court is of the opinion that the motion for judgment n.o.v. should be overruled.

Turning now to the alternative motion for a new trial, the Court, having considered the entire record herein, is of the opinion that evidence was introduced at the trial to support the verdict of the jury and that the verdict was not against the clear weight of the evidence. Accordingly, "if there is evidence to support the verdict (and the verdict is not against the weight of the evidence), the trial court must enter judgment in accordance with the verdict; it cannot order a new trial." 5A Moore's Federal Practice, 50.11 at 50-98 (2d ed. 1982) (Phrase added to quote). See also Cutter v. Cincinnati Union Terminal Co., 361 F.2d 637 (6th Cir. 1966); Duncan v. Duncan, 377 F.2d 49 (6th Cir. 1967), cert. denied, 389

U.S. 913, 19 L.ED. 260; and Hines v. Prudential Insurance Company of America, 235 F. Supp. 695 (E.D. Tenn. 1965), aff'd, 357 F.2d 726 (6th Cir. 1966).

It should be noted that, at the plaintiff's attorneys' request, the jury was polled after its verdict was announced, and all jurors responded, upon being individually asked, that the verdict as announced by the foreperson was correct.

Finally, as to the assertion that the jury refused to follow the Court's instructions, etc., it suffices to say that there is no competent evidence of such. The newspaper account of a reporter's conversation with one juror involving that juror's personal feelings is inadmissible hearsay and does not constitute admissible evidence. Moreover, a juror is not competent to impeach the jury's verdict in such a manner as such is expressly prohibited by Rule 606(b) of the Federal Rules of Evidence. In this regard, it should be noted that the Court instructed the jury on at least three occasions as to the applicable case law to be applied to the facts as determined by the jury. Further, the Court instructed the jury on at least two occasions, once on voir dire, that it was in duty bound to follow the law and apply it to the facts as determined by it. Therefore, having considered said alternative motion for a new trial and the entire record herein, the Court is of the opinion that the said alternative motion should be overruled.

In accordance with the foregoing, it is ORDERED that the

plaintiff's motion for judgment notwithstanding the verdict and in the alternative for a new trial be and it hereby is overruled.

ENTER:

/S/_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE SOUTHERN DIVISION

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER Plaintiff vs. CITY OF CHATTANOOGA, TENNESSEE, et al Defendant	CIV. 1-83-139

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Notice is hereby given that Rosa Carter, Administratrix of the Estate of Adrian Miles Carter, deceased, plaintiff named above hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order overruling her motion for judgment notwithstanding the verdict and in the alternative for a new trial entered in this action by the trial judge on February 28, 1984.

Respectfully submitted,
/S/_____
JOHN W. McCLARTY
Attorney for Plaintiff
18 Patten Parkway
Chattanooga, TN 37402

/S/_____
RHEUBIN M. TAYLOR
Attorney for Plaintiff
615 Lindsay Street, Ste. 400
Chattanooga, TN 37402

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-5247/5276

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROSA CARTER, Administratrix of the ESTATE OF ADRIAN MILES CARTER, Deceased,
Plaintiff-Appellant, Cross-Appellee.

v.

CITY OF CHATTANOOGA, TENNESSEE,
Defendant-Appellee, Cross-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed October 6, 1986

Before: JONES and WELLFORD, Circuit Judges; and GILMORE, District Judge.*

GILMORE, District Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 24-39) delivered a separate dissenting opinion.

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*The Hon. Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

GILMORE, District Judge. In this case, plaintiff-appellant's son was shot and killed by Chattanooga police in December 1982 during an attempt to escape from the scene of a daytime burglary. Appellant sued under 42 U.S.C. § 1983, claiming that her son's Fourteenth Amendment rights had been violated by both the officer and the city.

At the time of the shooting, the City of Chattanooga trained its police officers in accordance with Tennessee's "fleeing felon" statute,[1] which authorized the use of deadly force to apprehend a fleeing felon after notice of intent to arrest. Subsequently, however, this Court decided *Garner v. Memphis Police Department*, 710 F.2d 240 (6th Cir. 1983), *aff'd sub nom. Tennessee v. Garner*, 471 U.S. _, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985), holding that the statute, and a city policy based on it, authorized unconstitutional "seizures" under the Fourth Amendment as applied to those suspected of committing non-dangerous felonies, who were not armed nor otherwise apparently dangerous.

After this Court's decision in *Garner*, plaintiff amended her complaint to include a Fourth Amendment claim, and moved for summary judgment as to liability, asking to try only the issue of damages. This motion was denied. Both the city and the officer also moved for summary judgment. The trial court granted the officer's motion, based on qualified immunity, but denied the city's motion, holding that this Court's § 1983 decision in *Garner* should be applied retroactively. The case was tried in January 1984, and the jury charged in accordance with our decision in *Garner*. The verdict was for the city, and this appeal followed. The city has cross-appealed, urging the Court to decide two additional issues, if it finds merit in plaintiff's claims of error.

---

[1] Tenn. Code Ann. § 40-808 (1975), subsequently recodified as § 40-7-108 (1982). The statute provides in pertinent part that "[I]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

Around 1:30 p.m. on December 21, 1982, Lt. Kyle and two other Chattanooga police officers arrived at 915 Vine Street in response to an indication from a silent burglar alarm. They observed that a window facing the carport was broken and open. Officer Eilders started to enter through the window but was restrained by Lt. Kyle, who felt that was too dangerous. Voices were heard from inside the house.

Lt. Kyle directed each of the others to cover a corner of the house. As he mounted the porch at the side of the home, he saw a male appear in the doorway, yell something, and disappear back into the house. Lt. Kyle radioed the dispatcher that there was a burglary in process and asked for additional units.

A fourth police officer arrived, and Lt. Kyle stationed him at a corner and went to the rear of the house to take the last remaining corner. Two men jumped off the porch on the right side of the house, and one (later identified as appellant's son, Carter) began running in a crouched position away from the house with an object in his right hand, which Lt. Kyle could not identify. Lt. Kyle twice ordered Carter to halt, but he continued to run. As Carter approached the corner of the house, Kyle fired twice, slipped and fell. Carter was hit once, and died later at the hospital.

Lt. Kyle testified that Carter had said nothing to him or to the other officers prior to the shooting. He also testified that he had not attempted to chase Carter, and had shot him from some 45 to 55 feet away. He stated he had seen something in Carter's right hand, which later turned out to be a facecloth or a washcloth.

The verdict of the jury was for the city, and appellant has raised three issues on appeal. She first contends the trial court should have granted a motion for summary judgment on the issue of liability, allowing the jury to decide only the issue of damages. She next contends that the district court erred in denying her motion for judgment notwithstanding the ver-

dict based on the evidence put before the jury, and she finally contends that she should be granted a new trial on the basis that the jury's verdict was against the great weight of the evidence.

Defendant has filed a cross appeal, arguing that the trial court erred in applying this Court's decision in *Garner* retroactively to deny the city summary judgment, and that the district court erred in sustaining an objection to its offer of proof by testimony of Chattanooga Police Commissioner Kennedy as to the nature of burglary as a violent crime in Chattanooga.

II

The first issue is whether the district court erred in applying the law of *Garner* in the trial of this case. In *Tennessee v. Garner*, 471 U.S. _, 105 S.Ct 1694, 85 L.Ed. 2d 1 (1985), the Supreme Court of the United States, affirming this Court, held that the Fourth Amendment prohibits the use of physical force to prevent the escape of a suspected felon, unless it is necessary to prevent the escape, *and* unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. It thus held the Tennessee statute unconstitutional insofar as it authorized the use of deadly force to prevent the escape of an apparently unarmed suspected felon:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee Statute is unconstitutional

> insofar as it authorizes the use of deadly force against such fleeing suspects.
>
> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.

85 L.Ed. 2d 9-10.

The standards established by the Sixth Circuit, which were much the same as those of the Supreme Court, were used by the trial judge in charging the jury here.

The question is whether *Garner* should have been applied retroactively to the instant case. The incident involved here occurred on December 21, 1982. *Garner* was decided in this Court on June 16, 1983. Trial of this case commenced in January 1984, and *Garner* was decided in the Supreme Court of the United States on March 27, 1985.

As another panel of this Court recently pointed out, the general rule in civil cases is that a recent authoritative opinion interpreting the law should be applied to pending cases. In *Lawson v. Truck Drivers, Chauffeurs and Helpers, etc.*, 698 F.2d 250, 254 (6th Cir. 1983), the court said:

> The normal rule is that in civil cases a recent authoritative opinion interpreting the law should be applied to pending cases unless it represents a "clean

> break" with the past and unless in addition it would be fundamentally unfair or otherwise burdensome to so apply it.

In considering the issue of nonretroactivity, the United States Supreme Court in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), set forth a three-pronged analysis in determining whether an appellate decision in a civil case should be applied prospectively only:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . ., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07.

Subsequently, in *United States v. Johnson*, 457 U.S. 537, 563 (1982), the Court reiterated the *Huson* standards for civil retroactivity: "Finally, all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron Oil Company v. Huson*, 404 U.S. at 106-107."

An analysis of the three factors leads us to the conclusion that the trial court was correct in applying the standards of *Garner* retroactively.

In *United States v. Johnson*, *supra*, the Court discussed the three prongs of the *Huson* test:

> In the civil context, in contrast, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. See *e.g.*, *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971). Once it has been determined that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied. . .or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application. *Id.*, at 106-107. See also *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968).

Id. at 550 n.12.

From this it can be seen that the three prongs of the *Huson* tests are not equivalent. The first—whether the decision represented a clear break from prior precedent or practice—is a threshold test. If a decision does not meet this first test, the analysis is over, and the court need not proceed to apply the other two *Huson* prongs.

The first criterion of the *Huson* test is that decisions are to be applied retroactively unless they establish a new principle of law, either by overruling clear past precedent on which litigants have relied or by deciding an issue of first impression whose resolution is not clearly foreshadowed.

Three years prior to this Court's 1983 decision in *Garner*, a panel of this Court issued an earlier opinion in the *Garner* case, remanding the case in light of the Supreme Court's decision in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978). *See Garner v. Memphis Police Dep't*, 600 F.2d 52 (6th Cir.

1979) (hereinafter known as "the first *Garner* case"). In the first *Garner* case, the court specifically left open the following question in the case against the city: "Is a municipality's use of deadly force under Tennessee law to capture allegedly non-dangerous felons fleeing from nonviolent crimes constitutionally permissible under the Fourth, Sixth, Eighth and Fourteenth Amendments?" *Id.* at 55. In addition, the court in the first *Garner* case held that: "Our previous decisions do not establish the constitutionality of Tenn. Code Ann. § 40-808, permitting a city to authorize its officers to use deadly force against a fleeing felon." *Id.* at 54.

Prior to that decision, a three-judge district court had upheld the facial constitutionality of the statute in question in *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971), and this Court had declared the statute constitutional in *Beech v. Melancon*, 465 F.2d 425 (6th Cir. 1972), *cert. denied* 409 U.S. 1114 (1973), and *Wiley v. Memphis Police Department*, 548 F.2d 1247 (6th Cir.), *cert. denied* 434 U.S. 822 (1977).

The first *Garner* case distinguished *Beech* and *Wiley*, as well as another case from this circuit, *Qualls v. Parrish*, 534 F.2d 690 (6th Cir. 1976). Thus, the very issue that was eventually decided in the second *Garner* case, which was applied by the trial court here, was declared in the first *Garner* case to be an open question in this circuit in 1979, more than two years after *Wiley*, and more than three years before the shooting in the instant case. As an earlier decision in the same case, the first *Garner* opinion represents the law of the case in the very case which appellee argues was such a sharp break with past precedent that it should not apply retroactively. Appellee apparently disagrees with the reasoning that led the first *Garner* court to its decision, but, correct or incorrect, that was indisputedly the law of this circuit after that decision. *See Taylor v. Collins*, 574 F. Supp. 1554, 1557-58 (E.D. Mich. 1983), applying the second *Garner* case retroactively.

Furthermore, it is clear that within the country at large this was an area very much in turmoil. As the Supreme Court noted in *Garner*:

> It cannot be said that there is a constant or overwhelming trend away from the common-law rule. In recent years, some States have reviewed their laws and expressly rejected abandonment of the common law rule. Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States.
>
> This trend is more evident and impressive when viewed in light of the policies adopted by the police departments themselves. Overwhelmingly, these are more restrictive than the common-law rule. . . .The Federal Bureau of Investigation and the New York City Police Department, for example, both forbid the use of firearms except when necessary to prevent death or grievous bodily harm. For accreditation by the Commission on Accreditation for Law Enforcement Agencies, a department must restrict the use of deadly force to situations where "the officer reasonably believes that the action is in defense of human life. . .or in defense of any person in immediate danger of serious physical injury." Commission on Accreditation for Law Enforcement Agencies, Ind., Standards for Law Enforcement Agencies 1-2 (1983) (italics deleted). A 1974 study reported that the police department regulations in a majority of the large cities of the United States allowed the firing of a weapon only when a felon presented a threat of death or serious bodily harm. . . .Overall, only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not. . . .

> In light of the rules adopted by those who must actually administer them, the older and fading common-law view is a dubious indicium of the constitutionality of the Tennessee statute now before us.

85 L.Ed. 2d at 14.

At the time *Garner* was decided in the United States Supreme Court, 20 states had adopted a version of the Model Penal Code § 3.07(2)(b) prohibiting the use of deadly force, except in the circumstances set forth in the *Garner* case, and two other states had prohibited the use of deadly force to prevent any but violent felonies. *Id.* at 13. And, as early as 1967, the President's Commission on Law Enforcement and the Administration of Justice issued a task force report recommending that the use of deadly force by police officers be limited to circumstances where it is essential to physical protection or where violence had been used in the felony. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 189 (1967).

In 1970, the National Commission on Reform of Federal Criminal Laws came to much the same conclusion in a study draft of a new Federal Criminal Code. U.S. Nat'l Commission on Reform of Fed. Crim. Laws, Study Draft of a New Fed. Crim. Code § 607(2)(d) (1970). By then, numerous legal scholars had written in favor of the more restrictive view of the use of deadly force.[2]

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[2]Greenstone, Liability of Police Officers for Misuse of Their Weapons, 16 Clev.-Mar. L. Rev. 397 (1967); Note, Justification: The Impact of the Model Penal Code on Statutory Reform, 75 Colum. L. Rev. 914 (1975); Comment, The Use of Deadly Force in the Protection of Property Under the Model Penal Code, 59 Colum. L. Rev. 1212, 1218 n.35 (1959); Tsimbinos, The Justified Use of Deadly Force, 4 Crim.L.Bull. 3 (1968); McDonald, Use of Force by Police to Effect Lawful Arrest, 9 Crim. L. Q. 27 (1967); Perkins, The Law of Arrest, 25 Iowa L. Rev. 201 (1940); Comment, The Use of Deadly Force in Arizona by Police

Prior to *Garner*, several federal courts of appeal had found the use of deadly force by police unlawful in certain circumstances. In *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970), the court found a Fourth Amendment violation where a police officer accidently shot a fleeing youth, whom the officer believed was armed, on the grounds that the officer was "grossly or culpably negligent." In *Jones v. Marshall*, 528 F.2d 132, 140 (2d Cir. 1975), the court stated its view that:

> [T]he preferable rule would limit the privilege [to use deadly force in arresting felony suspects] to the situation where the crime involved causes or threatens death or serious bodily harm, or where there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

The court nevertheless held that:

> While the Fourteenth Amendment may require us to make an independent assessment of the fairness of the state rule,. . .we are today interpreting Section 1983, and within that statute the states must be given some leaway in the administration of their systems of justice, at least insofar as determining the scope of such an unsettled rule as an arresting officer's privilege for the use of deadly force.

Officers, 1973 L. & Soc. Order 481, 482 (1973); Pearson, The Right to Kill in Making Arrest, 28 Mich. L. Rev. 957 (1930); Wilgus, Arrest Without a Warrant, 22 Mich.L.Rev. 541, 569 (1924); Moreland, The Use of Force in Effecting or Resisting Arrest, 33 Neb. L. Rev. 408 (1954); Note, Criminal Law—Use of Deadly Force in Preventing Escape of Fleeing Minor Felon, 34 N.C. L. Rev. 122 (1955); Note, Justification for the Use of Force in the Criminal Law, 13 Stan. L. Rev. 566 (1961); Bohlen & Shulman, Arrest With and Without a Warrant, 75 U. Pa. L. Rev. 485, 495 (1927); Note, Legalized Murder of a Fleeing Felon, 15 Va. L. Rev. 582 (1929); Note, Justifiable Use of Deadly Force by the Police; A Statutory Survey, 12 Wm. & Mary L. Rev. 67 (1970).

Id. at 142.

In *Mattis v. Schnarr* 547 F.2d 1007 (8th Cir. 1976), the court performed a due process analysis of a Missouri statute quite similar to the Tennessee statute, and found it unconstitutional as applied against fleeing felons who have not used deadly force in the felony, and whom the officer does not reasonably believe will use such force against the officers, if not immediately arrested. Although the judgment in that case was later vacated as moot, *Ashcroft v. Mattis*, 431 U.S. 171 (1977), and the reasoning was specifically rejected in *Wiley*, these decisions should have served to put city attorneys within this circuit on notice that the law in this area was in a state of flux. Within this broader national context, it would have been unreasonable for city attorneys within this circuit to have blindly trusted in the authority of *Wiley* in light of this court's express statement in the first *Garner* case that the constitionality of the statute under the Fourth Amendment was an open one. This Court cannot conclude that the second *Garner* decision represented the sort of clear break with established authority contemplated by the first prong in *Huson*. It is therefore clear that our consideration of this first prong calls for a retroactive application of that decision.[3]

As the Supreme Court pointed out: ". . . [T]he long term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the states." 85 L.Ed. 2d at 14. It therefore is clear that this case was not a clear break with past precedent. There were clear trends among the states and many courts of appeal to put limits such as those imposed in *Garner* upon the use of deadly force to apprehend a fleeing felon. It is clear to us that the first factor of *Huson* against nonretroactivity has been met.

---

[3]For a comprehensive discussion of the trend of the law in the fleeing felon rule, see Comment, *The Unconstitutional Use of Deadly Force Against Nonviolent Felons*, 18 Georgia Law Review, 137 (1983).

The application of the second *Huson* factor militates in favor of applying *Garner* retroactively. This factor calls for weighing the merits and demerits of retroactive application in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

As the Supreme Court said about this prong of the test in *Linkletter v. Walker*, 381 U.S. 618, 629 (1965):

> We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures. Rather than "disparaging" the Amendment we but apply the wisdom of Justice Holmes that "[t]he life of the law has not been logic: it has been experience." Holmes, *The Commmon Law* 5 (Howe Ed. 1963).

The purpose of the ruling in *Garner* was to insure that victims of unconstitutional state action are compensated fairly for constitutional violations. By declining to apply the decision retroactively, the district court would have hindered rather than furthered the goal of 42 U.S.C. § 1983. It is clear now that the policy of allowing deadly force to be used against every fleeing felon, even where he presents no danger to the officer or other people, cannot be squared with the Constitution.

An award in damages in this case would serve not to punish the city but to compensate appellant for the result of the city's unconstitutional conduct. The question is not whether the city intentionally violated the Constitution or whether it continues to do so, but whether compensation would be so inimical to the goals at issue that this case must be placed into the exception to the usual rule of retroactive application. This was, after all, an action under § 1983, which is a statute designed to insure that victims of unconstitutional state action are fairly compensated for the violation. By declining to apply *Garner* retroactively in this case, the district court

would have hindered, rather than furthered, the goals of Section 1983.

We have already decided that the second *Garner* decision in the Sixth Circuit was significantly foreshadowed by the first *Garner* decision, and other events. It is clear now that the policy of allowing deadly force to be used against every fleeing felon, even where he presents no danger to the officer or others, cannot be squared with the Constitution. In *Garner* itself, the Supreme Court struck down a well-established Tennessee practice long relied upon, and its ruling was not prospective only. There was no more forewarning to the city in *Garner* of the liability that would attach than there was here. Yet, the Court in *Garner* directed the suit for damages to proceed. It is logical that in this case the Court should apply the teaching of *Garner*. Consideration of the second *Huson* prong calling for the balancing of the merits and demerits of prospective only application weighs in favor of the retroactive application of *Garner* to this case.

Similarly, the application of the third *Huson* factor counsels retroactivity. In the third factor, the court is required to weigh the inequity that would be imposed by retroactive application. While we recognize that some municipalities will be subject to unanticipated damage awards under 42 U.S.C. § 1983, despite good faith efforts to comply with the law, the inequity would be still greater if the court refused to apply the *Garner* precedent retroactively here. Such a refusal would result in the sad anomaly of affording Mr. Garner a new trial in Memphis for the shooting of his son while denying Mrs. Carter a new trial for the shooting of her son eight years later in Chattanooga under the same statute.

It is therefore clear to the Court that all three prongs of the *Huson* test have been met and the *Garner* decision was properly applied retroactively by the district court in the instant case.

III

Appellant next contends that the issue of liability in this case should not have been put to the jury, but that the case should have been sent to the jury only on the question of damages. She filed a motion for partial summary judgment, claiming that the undisputed facts showed that there was no probable cause for Lt. Kyle to have believed that the deceased presented a danger to the officers or to others. This motion was denied by the district court, which concluded that the record was not clear enough to enable it to determine as a matter of law that Lt. Kyle's actions violated the standards of *Garner*. The court pointed out that the facts relevant to the disposition of the motions were not in dispute. It said:

> At about 1:30 on the afternoon of December 21, 1982, the plaintiff's decedent, Adrian Miles Carter, was discovered in the act of burglarizing a house at 915 Vine Street, in Chattanooga, Tennessee. Defendant Kyle and two other police officers of Chattanooga arrived at the house after having been notified that a silent burglar alarm had indicated an unauthorized entry into the house. Upon seeing the police, Carter attempted to flee, was ordered to halt by Lt. Kyle, and, after failing to do so, was shot by Kyle. Carter later died at the hospital. To Kyle's knowledge, Carter was unarmed, had made no threats of harm to any police officer or any other person, and was attempting to flee from a daylight burglary of a residence.
>
> Kyle was acting within the course and scope of his employment as a police officer of the City of Chattanooga at the time this incident occurred. The defendant Chattanooga, a municipal corporation organized under the laws of Tennessee, maintained written policies in the form of general orders in its police manual governing the use of force in the apprehension of fleeing felony suspects. One section

> of the manual contains by reference the provisions of a Tennessee statute, Tenn. Code Ann. § 40-7-108, which provides:
>
> > *Resistance to officer.*—If, after notice of intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.
>
> According to Lt. Kyle's affidavit, which is uncontroverted, he did not believe there was any other way of apprehending Carter, and that if the measures which were taken had not been taken, Carter would have escaped. Kyle further avers that he knew that the conduct in which Carter had been engaged had been a felony under the laws of Tennessee. Finally, Kyle asserts that he believed in good faith that he was authorized to use deadly force to apprehend a fleeing felon by the laws of Tennessee, and the policies of Chattanooga contained in his police manual.

Carter v. City of Chattanooga, Nos. 84-5247 & 84-5276, at 2-3 (E.D. Tenn. filed Jan. 27, 1984).

In a thorough and careful opinion, Judge Milburn concluded that *Garner* should be applied to the case and that the City's policy of the use of deadly force was unquestionably unconstitutional. The district court found, however, that whether the actions of Kyle satisfied the standards of *Garner* was an issue of fact that should be submitted to a jury. The court therefore denied the motion for summary judgment.

Although this Court is of the opinion that the facts set forth by the trial court provide a sufficient basis to direct the issue of liability[4], the Court does not feel that it was error for the district court to deny the motion for summary judgment. The findings made in ruling on the summary judgment motion

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[4]See discussion, *infra*, at 20-25.

do not exclude proof of other circumstances which might have permitted the use of deadly force under *Garner*. Evidence might have been presented at trial, for example, that Kyle knew that appellant's son, Carter, had a reputation for violence, or that he knew of some violent circumstances surrounding the commission of the crime,—for example, that someone had been assaulted in the home. It is also possible that at trial Kyle might have identified a certain distinctive *modus operandi* tying the burglary to other recent burglaries that had been violent. In short, we do not think that the findings made by the district court on summary judgment necessarily exclude the existence of such circumstances under which the Tennessee statute could pass constitutional muster. Therefore, we cannot say it was error for the court to deny the motion for summary judgment and allow the issue of liability to go to trial.

IV

The case proceeded to trial, and a judgment of no cause for action was rendered for the city. Appellant then moved for judgment notwithstanding the verdict, based upon the evidence that was presented to the jury. This motion was denied, and appellant urges this Court to reverse and remand for trial on the issue of damages only.

In deciding a motion for judgment n.o.v., the court

> may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor.

Morelock v. NCR Corp., 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979).

The standard of review on appeal is the same as the standard used by the trial court, namely, whether reasonable

minds could differ. 9 Wright & Miller, *Federal Practice and Procedure* § 2524 at 541-46. Therefore, if some evidence in this case, viewed in the light most favorable to the city, could reasonably give probable cause for a belief on the part of Lt. Kyle that Carter posed a significant threat of death or serious physical harm to him or others, the motion for a judgment n.o.v. must be denied. On the other hand, if there is no evidence which would give Lt. Kyle probable cause to feel that there was a significant threat of death or serious physical harm to him or others, then the district court erred in denying the motion for a judgment n.o.v.

Lt. Kyle had earlier been dismissed from the case because the court found he was acting in good faith, and this dismissal is not challenged.

We find that the district court erred in not granting the motion, setting aside the verdict, and granting judgment n.o.v.

Significant in making this decision is the testimony of Lt. Kyle. Lt. Kyle testified that Carter had said nothing to him or to the other officers prior to the shooting, that he had not seen a weapon, but had seen "something" in Carter's right hand, and had not tried to chase Carter down. As it turned out, Carter had a facecloth or a washcloth in his hand. Kyle testified that Carter was some 45 to 55 feet away when he fired. Lt. Kyle further testified that it was his understanding that, under the police manual, there were three occasions when the use of deadly force was authorized:

1. To protect the citizens and their property;

2. To protect himself;

3. To stop a fleeing felon.

(Jt. App. 73)

In this instance, he justified his shooting under the third category, namely, stopping a fleeing felon and protecting

property in the apprehension of the suspect. He testified as follows:

> Q. Your life was not in danger; you were not being apprehended by this young man, anything of that nature?
>
> A. Not that I know of.
>
> Q. And you shot in an attempt to stop this young man who you consider a fleeing felon, is that correct?
>
> A. Yes, sir.

(Jt. App. 74.)

Later, in answer to the question:

> Did you consider him to be dangerous to the community or to the public if he hadn't been captured?

Kyle responded:

> A. Anyone is dangerous to me that is inside a building or residence that has forced their way in, because we have no way of knowing whether or not they are armed. In most instances, whoever breaks in a business or residence has used some kind of weapon to break in. Therefore I did not know that, if he was armed or not armed.
>
> Q. Did you have what is called probable cause to believe that he was armed?
>
> A. I could say yes, because the window being broken out, and I did not see anything on the outside that would show a weapon was left outside the residence.
>
> Q. Tell me this, then . . . where was your probable cause that you consider this man was armed?
>
> A. He was running with something in his right hand, which I could not tell what it was.

Q. Basically you shot because this was a fleeing felon. Isn't that correct, Officer?

A. I shot because he was a burglar. He was fleeing the scene and he failed to yield to halt.

(Jt. App. 77-79).

Later on, the following testimony was given:

Q. And you shot simply because this was a fleeing felon?

A. And he was at the scene of a burglary. Yes, sir.

(Jt. App. 84).

Lt. Kyle later testified that, from his 23 years' experience on the police force, he has observed that burglars usually take money, jewelry and guns. Then there was the following exchange:

Q. There were no threats, is that correct?

A. No, sir.

Q. You did not have any probable cause to believe he was armed, is that correct?

A. Except for him running with something in his right hand. That's all.

Q. And had he demonstrated to you, in your presence, or did you have cause to believe, that he created a danger to the community or to anyone else?

A. Well, if he had gotten away, he could have inflicted other damages to other houses or committed burglary right on.

Q. But there wasn't anything you saw at the time that you shot that gave you probable cause to believe that?

A. No, sir.

> Q. Isn't that correct? And that you shot simply because you had caught him in the process, in the act of committing a felony, and he was attempting to get away?
>
> A. True.

(Jt. App. 103-104).

The record is quite clear that the only reason that Lt. Kyle shot Carter was because he had caught him in a burglary and Carter was in the act of fleeing from a burglary. Lt. Kyle's own testimony shows that at no time did he feel that his life, or the life or well-being of any other person, was threatened.

Appellee's position is that burglaries are inherently dangerous situations. The aspect of the case repeatedly mentioned by Lt. Kyle, apart from the simple fact that Carter was a fleeing felony suspect, is that he was fleeing from the scene of a burglary and, in Lt. Kyle's view, presumed dangerous.

No one questions that it is good police work to assume that where a burglary is in progress one must conduct the investigation at the scene with great caution. But it does not necessarily follow that, because a burglary should be approached as a *potentially* dangerous situation, an investigating officer automatically has probable cause to use deadly physical force to apprehend any suspect who attempts to flee the scene. Indeed, the United States Supreme Court addressed this very issue in the context of the nighttime burglary in *Garner*:

> While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. . . . Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. . . . In fact, the available

> statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973-1982, only 3.8% of all burglaries involved violent crime.

85 L.Ed. 2d at 16.

Thus, Lt. Kyle's belief that burglaries in general are dangerous situations cannot, without more, be the basis for a finding of probable cause to believe that this particular burglary suspect presented a danger to the officers or to the community. Although Lt. Kyle's testimony that he saw an object in Carter's hand and that a window into the house had been broken might have given him a bare suspicion that the intruders might be armed, this Court cannot say that these observations gave rise to probable cause. The fact a window is broken is some slight evidence of use of a weapon, but it is hardly conclusive. Furthermore, it is hard to imagine how Lt. Kyle could have mistaken a washcloth in Carter's hand for a weapon as he fled from the scene of this early-afternoon crime. Officer Eilders, who was also at the scene and observed the fleeing suspects, did not see any weapon upon either suspect.

It is clear from a thorough review of the record, especially from Lt. Kyle's own testimony, that Lt. Kyle fired because he thought Carter was about to escape from a suspected burglary, and that he had been trained to use deadly force to prevent that. The use of force under such circumstances is not justified under *Garner*. *Garner* specifically holds that deadly force may not be used to apprehend the suspect in a non-violent felony unless it is necessary to prevent an escape, and the officer has probable cause to believe that the suspect is armed, or otherwise poses a significant threat of death or serious injury to the officer or others.

In this case, there can be no dispute that Lt. Kyle did not have probable cause to believe that the suspect posed a significant threat of death or serious physical injury to anyone. In fact, he essentially admitted that he shot Carter simply

because he had caught him in the process of a burglary and he was attempting to escape.

The Fourth Amendment does not allow the use of deadly force in such circumstances, and the trial judge should have granted a judgment n.o.v. Therefore we hold that there is no issue of fact on the question of liability in this case. A verdict of liability should have been directed. The case is remanded to the trial court for a trial on the issue of damages only.[5]

Reversed and remanded.

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[5]We find the second claim of the cross-appeal—that the district court erred in excluding Commissioner Kennedy's testimony—without merit.

WELLFORD, Circuit Judge, dissenting:

I find the majority's retroactivity treatment to be erroneous under a proper analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and its progeny. I therefore dissent. The majority correctly selects the *Chevron Oil* test as the appropriate standard in determining whether invalidation of the fleeing felon rule, as previously authorized by statute in Tennessee, should be applied retroactively to impose liability on the City of Chattanooga for relying on and enforcing that rule in 1982. Despite the majority's effort to minimize the clear legal status of the fleeing felon rule at the time the shooting took place in this case, a proper application of the *Chevron Oil* test and a careful review of the rule's constitutional validity at the time of the fatal shooting indicate that this court's decision in *Garner v. Memphis Police Dep't*, 710 F.2d 240 (6th Cir. 1983) (hereinafter *Garner II*), and the Supreme Court's affirmance in *Tennessee v. Garner*, 105 S.Ct. 1694 (1985), should not be retroactively applied.

The initial hurdle that must be overcome before a court ruling is given retroactive effect is a determination of whether the decision marks a "new principle of law, either by overruling clear past precedent on which litigants may have relied . . .. or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . ." *Chevron Oil*, 404 U.S. at 106. Subsequent Court statements have given substance to the "clear break" principle, suggesting that a decision should not be given retroactive effect when it involves a "newly minted principle," *United States v. Johnson*, 457 U.S. 537, 549 (1982); "marks a sharp break in the web of the law;" or "disrupts a practice long accepted and widely relied upon. . . ." *Milton v. Wainwright*, 407 U.S. 371, 381-82 n.2 (1972) (Stewart, J., dissenting). Further, the *Johnson* Court set forth a comprehensive discussion of considerations suggesting nonretroactive application of a court ruling when that decision represents a clear break from prior law:

> In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law, . . ." unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one, ..." Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, . . . or disapproves a practice this Court arguably has sanctioned in prior cases, . . . or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. See, *e.g., Gosa v. Mayden*, 413 U.S., at 673 (plurality opinion) (applying non-retroactively a decision that "effected a decisional change in attitude that had prevailed for many decades"); *Stovall v. Denno*, 388 U.S., at 299-300. See also *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Milton v. Wainwright*, 407 U.S. at 381-382, n.2 (Stewart, J., dissenting) ("sharp break" occurs when "decision overrules clear past precedent . . . or disrupts a practice long accepted and widely relied upon").

457 U.S. at 551-52 (citations omitted).[1] The underlying concern expressed in these cases is the inequity and harshness retroactive application of a new rule of law would impose on parties who had no significant reason to doubt the invalid-

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[1]Although *Johnson* concerns the retrospective application of a criminal procedure ruling to convictions still pending on appeal, and not to retroactivity in civil cases, the threshold test under *Chevron Oil* and *Johnson* are essentially the same. The *Johnson* Court relied on several civil retroactivity cases in defining when a decision presents a clear break from past precedent. Thus the *Johnson* Court's amplification on when a clear break in law has been demonstrated is equally applicable to civil cases under the *Chevron Oil* analysis.

ity or unconstitutionality of a statute or practice. A review of the fleeing felon rule's history indicates that *Garner* overturned "a longstanding and widespread practice" the Supreme Court had previously not addressed, "but which a near-unanimous body of lower court authority ha[d] expressly approved." *Id.* at 551.

The fleeing felon rule originated early at common law and still constituted the law after nearly two hundred years in this country in approximately one half of the states, including Tennessee at the time *Garner* was decided. *Garner*, 105 S. Ct. at 1703-04 n.14-16. Tennessee was one of nineteen states that had codified the principle. Legislatures in some states had abandoned the rule by opting for the Model Penal Code language or had curtailed the rule by permitting use of deadly force only in certain circumstances. *Id.* at 1704 n.17-18. Significantly, none of the states that had abandoned the common law rule cited any constitutional basis for their decisions, but concluded as a matter of their own policy that the old rule should be replaced or modified. *See Garner*, 105 S. Ct. at 1702-06; *see also Sauls v. Hutto*, 304 F. Supp. 124 (E.D. La. 1969) (quoting Prof. Wechsler's statement of the basis for the Model Penal Code position: "[t]he preservation of life has such moral and ethical standing in our culture and society, that the deliberate sacrifice of life merely for the protection of property ought not to be sanctioned by law." *Id.* at 131 n.18, *quoting from* 1958 American Law Institute proceedings at pp. 285-86).

Prior to this court's *Garner II* decision, no court had struck down the fleeing felon rule as unconstitutional as an unreasonable search and seizure under the fourth amendment. To the contrary, we had on three occasions upheld the Tennessee statute as constitutional.

The first case to examine the Tennessee statute was *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971), decided by a three-judge panel consisting of Circuit Judge Harry Phillips, then Chief District Court Judge Bailey

Brown, and District Judge Robert McRae. Plaintiffs in *Cunningham* brought a wrongful death action under 42 U.S.C. § 1983 against police officers, the police director, and the mayor and also challenged the constitutionality of the Tennessee fleeing felon statute. The three-judge panel was convened "to hear and determine *only* the question of the facial constitutionality of the involved statute." *Id.* at 1074 (emphasis added). Plaintiffs attacked the statute as violative of the eighth amendment's prohibition against cruel and unusual punishment; as unconstitutionally vague and overbroad; as a denial of sixth amendment rights to trial by jury, to confrontation of witnesses, to assistance of counsel; and as a denial of equal protection. That court rejected these numerous constitutional arguments and held that the statute is not "unconstitutional on its face." *Id.* at 1076.

One year after the court reached its decision in *Cunningham*, we again addressed this issue, concluding significantly:

> This Statute [Tennessee' s fleeing felon statute] has been recently construed and found to be constitutional by a Three-Judge District Court. *Cunningham v. Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971). *In any event the police officers were entitled to assume the constitutionality of the Tennessee Statute. "State statutes like federal ones are entitled to the presumption of constitutionality until their invalidity is judicially declared. . . ."*

Beech v. Melancon, 465 F.2d 425, 426 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973) (citations omitted) (emphasis added). In a concurring opinion, however, Judge McCree expressed his own reservation about the constitutionality of the rule.

Once again this court examined the Tennessee statute in *Wiley v. Memphis Police Department*, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977). In *Wiley* police offi-

cers shot and killed a nighttime burglar who tried to flee when the officers caught him in the act of burglary. In reiterating the constitutionality of Tennessee's statute, the panel emphasized that the statute had twice been upheld as constitutional in *Cunningham* and *Beech* and that the statute's "invalidity, or that of a similar statute, up to [the time of the shooting] had never been declared by any Court." *Id.* at 1250-51. Turning its attention to the four-to-three en banc Eighth Circuit decision in *Mattis v. Schnarr*, 547 F.2d 1007 (1976), *vacated as moot sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977), which had found the fleeing felon rule violative of substantive due process, the panel strongly criticized the *Mattis* majority:

> The Eighth Circuit is the only Court to our knowledge which has ever held that such a statute, which is so necessary even to elementary law enforcement, is unconstitutional. It extends to the felon unwarranted protection, at the expense of the unprotected public.
>
> We agree with the dissent in the Eighth Circuit case (*Mattis v. Schnarr*), which was highly critical of the majority opinion for not following the decisions of other Circuits and for embarking on a new course which should have been left to the state legislatures where it belongs.

Id. at 1252. Concluding that the statute was constitutional, the panel found:

> We are of the opinion further that MPD, the City, the Mayor, and the former Mayor, and the Chief of Police had the same right to rely on the law of Tennessee and the decisions of this Court and the decision of the three-Judge Court in formulating their policies. Also, *they could rely on the presumption that the Tennessee statute was constitutional and on the fact that no court at that time had ever held that statute or a similar statute to be unconstitutional.*

Id. at 1254 (emphasis added). Concurring only in the result, Judge McCree stated:

> I concur in the result. . . . The district court, however, relied both on the fact that the officers could not have known whether the fleeing persons were armed and on the fact that no other means existed by which they could have been apprehended. There is sufficient evidence in the record to support the conclusion that the fleeing felons in this case did present an apparent threat to human life, and therefore I join in the decision of the court.

Id. at 1256.

Thus, until *Garner II*, we had repeatedly upheld the constitutionality of the fleeing felon rule, overruling a number of different challenges. Similarly, the Second Circuit in *Jones v. Marshall* had concluded that the fleeing felon rule presented no fourteenth amendment violation. 528 F.2d 132, 142 (2d Cir. 1975). Although the Second Circuit expressed its opinion that the common law rule should be changed as a matter of policy, the court declined to find the challenged action unconstitutional. The court held this issue to be a matter entrusted to the sound policymaking of state legislatures. *Id. See also* Note, *The Unconstitutional Use of Deadly Force Against Nonviolent Fleeing Felons*: Garner v. Memphis Police Department, 18 Ga. L. Rev. 137, 144 n.30 (1983) (citing state cases to the same effect).

As previously noted, one court did find the fleeing felon rule to violate substantive due process in *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976) (en banc) (4-3 decision), *vacated as moot sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977). A bare majority of the Eighth Circuit concluded that the longstanding common law rule could not withstand constitutional scrutiny.

Three dissenting judges, whose rationale was later adopted by this court in *Wiley*, challenged the validity of the majority's constitutional analysis:

> Thus, after a background of five centuries of the common law and two centuries of this country's existence, lo and behold the majority, *ipse dixit*, has held that the common law principles embodied in these Missouri statutes are violative of the Due Process Clause of our Constitution. While acknowledging that other courts have reached a contrary decision, the majority shows no interest in the direction taken by other judicial authorities and turns elsewhere for guidance. . . .
>
> * * *
>
> Indeed, prior to this decision, no court has held that the modification of a statute of this sort falls within the judicial purview delimited by the separation of powers contained in our Constitution.
>
> * * *
>
> On the other hand, the majority does not cite, nor can I find, any state where the common law rule on the use of deadly force, either codified or uncodified, has been invalidated by either a state or federal court. Those courts faced with attacks on the common law rule allowing all force reasonably necessary to effect the arrest of fleeing or resisting felons have consistently held that these attacks present policy questions for the legislature, not the judiciary. *Jones v. Marshall*, 528 F.2d 132 (2d Cir. 1975); *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971) (three-judge court); *Hilton v. State*, 348 A.2d 242 (Me. 1975); *Shumann v. McGinn*, 240 N.W.2d 525 (Minn. 1976).

547 F.2d at 1021-22 (Gibson, C. J., Stephenson, J., Henley, J., dissenting) (footnote omitted). Significantly, the precedential value of the majority view in *Mattis* was destroyed when the Supreme Court vacated the decision as moot the following year.

Despite a dearth of case law that questioned the validity of the common law rule, and despite the existence of a "near-unanimous body of lower court authority" expressly upholding the rule's constitutionality, somehow the panel majority discovers *Garner* not to present a clear break from prior precedent. The panel majority contends that several circumstances should have put the City of Chattanooga on notice that the rule was in a state of flux. The panel majority offers *no case law* authority indicating that the City of Chattanooga should have been put on notice that its practice was unconstitutional. The sole case that had cast doubt on the common law rule, adopted for more than a hundred years in Tennessee, had not only been vacated by the Supreme Court, but had been firmly repudiated by this Court in *Wiley*. It is immaterial that other states had chosen to abandon the common law rule in favor of the Model Penal Code approach. The panel majority fails to appreciate that this court and other courts had repeatedly concluded that a change from the long-standing common law rule was to be reserved for resolution by state legislatures rather than by court mandate.

To support the contention that the City of Chattanooga could have anticipated the *Garner II* decision, the majority relies on comments made in *Garner v. Memphis Police Dep't*, 600 F.2d 52 (6th Cir. 1979) (hereinafter *Garner I*) in its remand to the district court. Focusing on Judge McCree's concurrences, the *Garner I* panel reasoned that the Tennessee statute in question had not been conclusively shown to be constitutional. 600 F.2d at 54. *Garner I*, however, did not dispute that prior cases found the statute to be in fact constitutional. *Garner I* did not address the viability of *Cunningham*'s reasoning, which found the fleeing felon statute to be facially constitutional. The import of the *Garner I*'s distinctions was thus equivocal and ambiguous at best. On remand the district court relied specifically on *Cunningham*, which had not been distinguished in *Garner I*. *Garner v. Memphis Police Dep't*, No. C-75-145, slip op. at 3-5, 11 (W.D. Tenn. Feb. 29, 1980); *see also id.*, slip op. at

8 (W.D. Tenn. July 8, 1981). *See also Truss v. Collier*, 574 F. Supp. 1249, 1255-60 (S.D. Ohio 1983) (decided in the interim between *Garner I* and *Garner II*).

In *Truss* the district judge determined, despite his personal preference to abandon the fleeing felon rule, that he was compelled to uphold its validity in view of Sixth Circuit precedent. Upholding a similar Ohio statute, the *Truss* court remarked on comments made in *Garner I*:

> Given the above decisions by the Sixth Circuit, it would be unwarranted, as well as an abuse of the applicable authority, for this Court to conclude that the City of Springfield fleeing felon policy is unconstitutional. This is so, despite indications in later Sixth Circuit decisions that other panels of the Court might prefer a different result. *See, Garner v. Memphis Police Dep't*, 600 F.2d 52, 54-55 (6th Cir. 1979) (*Garner*), and *Haislah v. Walton*, 676 F.2d 208, 214, n.3, and 215 n.4 (6th Cir. 1982). . . .
>
> However much this Court might wish to interpret the relevant Sixth Circuit decisions in the manner suggested in *Garner*, such a conclusion would be impermissible, particularly with regard to the *Wiley* decision. As was previously noted, the plaintiff in *Wiley* did name the governmental entities such as the city and the police department as defendants, and did directly "challenge the deadly force policy of the City of Memphis, . . . [claiming] that such policy was a violation of the constitutional rights of her decedent." *Wiley, supra*, 548 F.2d at 1248. Thus, it is impossible to conclude that the Sixth Circuit has not spoken on the issue of the constitutionality of the fleeing felon rule. Consequently, until such time as the Sixth Circuit sitting *en banc* overrules or discards the precedent in *Wiley*, this Court is bound to follow that decision. Accordingly, this Court must conclude, albeit with great reluctance,

> that the fleeing felon policy promulgated by the City of Springfield did not violate the constitutional rights of the Plaintiff, Mark Truss. Having reached this somewhat distressing, but necessary conclusion regarding the constitutionality of the fleeing felon rule, the Court will next consider the qualified immunity defense of the Defendant, Paul Collier.

574 F. Supp. at 1260 (footnote omitted).

The question posed for remand in *Garner I* did not serve as notice to cities such as Chattanooga that the fleeing felon rule was constitutionally infirm. The question put on remand was: "[I]s a municipality's use of deadly force under Tennessee law to capture allegedly nondangerous felons fleeing from nonviolent crimes constitutionally permissible under the fourth, sixth, eighth and fourteenth amendments?" 600 F.2d at 55. *Garner I* did not discuss precedential decisions indicating that the rule was not constitutional; the court merely inserted a footnote citing various cases including the Second and Eighth Circuit cases previously discussed. Additionally the panel noted two law journal articles, one of which raised the fourth amendment as a possible basis for striking down the common law rule. *Id.* n.2, 3; *see* Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 Harv. C.R. — C.L.L. Rev. 361 (1976). In light of cases reaching opposite conclusions on the constitutionality of the fleeing felon rule, and particularly in light of prior authority in this circuit, *Garner I*'s formulation of the question on remand surely cannot be viewed as a foreshadowing of the rule's demise. To the contrary, *Garner I* gave the cities and their police departments no reasoned basis to conclude that prior decisions of this court were destined to be summarily overruled.

This conclusion is supported by two law review articles appearing after the Supreme Court decided *Garner II*. These articles determined after detailed research that the constitutional analysis in *Garner* was both novel and a clear break from past precedent.

> The Supreme Court's affirmance in *Garner* represents an unexpected, but nonetheless logical, extension of existing fourth amendment jurisprudence. The decision was *unexpected* both because the Burger Court has generally curtailed the scope of fourth amendment protections and because *the federal and state courts have been almost unanimous in upholding similar deadly force rules. The case also charted new territory* because the Court had never before held the means of arrest unreasonable when the officer had probable cause to believe the suspect had committed a crime. In addition, the Court for the first time explicitly recognized that the fourth amendment protects an individual's interest in life as well as her interests in property and privacy.

The Supreme Court—Leading Cases, 99 Harv. L. Rev. 120, 248 (1985) (emphasis added) (footnotes omitted). Similarly, a comment in The Cincinnati Law Review described *Garner II* as a "bold and pioneering step" and noted that prior to the 1983 Sixth Circuit ruling, "[e]xcept for one decision that was later vacated by the Supreme Court . . . the federal courts consistently had declined to hold that the application of the fleeing felon doctrine resulted in unconstitutional deprivations." Comment, *Tennessee Code Section 40-7-108 Authorizing the Use of Deadly Force by Police Officers Against an Unarmed Suspect of a Nonviolent Felony Is Unconstitutional Under the Fourth and Fourteenth Amendments*—Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983), 52 U. Cin. L. Rev. 1154, 1159, 1167 (1983).

The panel majority's analysis of the threshold test under *Chevron Oil* fails to take into account a required focus on how the rulings in *Garner II* and *Tennessee v. Garner* differed and departed from prior court rulings. This court's determination that the fleeing felon rule was unconstitutional in *Garner II* under the fourth and fourteenth amendments constituted a novel approach that set forth a "new principle of

law." To apply *Garner* retroactively is therefore unfair because the City of Chattanooga could not reasonably have anticipated in 1982 that the law might be struck down. The question is whether the ultimate holding in *Garner II* represented a clear break in precedent and whether the holding was reasonably anticipated by prior precedent. Only by ignoring clear precedent and focusing on other states' legislative decisions to amend the common law rule could the City of Chattanooga have predicted that the longstanding fleeing felon rule would be suddenly deemed unconstitutional.

Until today courts have never suggested that the threshold *Chevron* test can be satisfied by showing that many state legislatures as a matter of policy had opted to revise a particular statute that was based on a long recognized common law principle, despite the absence of any viable judicial decision that had clearly found the common law rule to be unconstitutional. Rather, the Supreme Court has required the clear break to be determined from prior *case precedent*. When, as with *Garner*, a case "overturn[ed] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved", the Supreme Court has determined that the threshold test has not been satisfied. *Johnson*, 457 U.S. at 551. The *Chevron* threshold, therefore, has not been satisfied in the instant case.

Next we must consider whether retroactive application of *Garner* would further or retard the operation of the Court's ruling. We make this determination " 'by looking to the prior history of the rule in question [and] its purpose and effect. . . .' " *Chevron Oil*, 404 U.S. at 107, *quoting Linkletter v. Walker*, 381 U.S. 618, 629 (1965). The majority claims that retroactive application of *Garner* would further the decision's purpose—to compensate victims of unconstitutional police misconduct. The panel majority suggests, however, that compensation to the fleeing felon's family should be the sole focus when the opinion is forward-looking, seeking to

deter officers from using deadly force. *See, e.g., Garner*, 105 S.Ct. at 1700-01; *Taylor v. Collins*, 574 F. Supp. 1554, 1558 (E.D. Mich. 1983); *see also Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1306 (1986) (Powell, J., dissenting) ("The primary reason for imposing § 1983 liability on local government units is deterence [sic], so that if there is any doubt about the constitutionality of their actions, officials will 'err on the side of protecting citizens' rights.' *Owen v. City of Independence*, 445 U.S. 622, 656, 100 S.Ct. 1398, 1418, 63 L.Ed.2d 673 (1980)"). Proof of improper use of deadly force may result in compensation to the decedent's estate, but this result is merely a collateral effect of applying the *Garner* rule. An award of damages against a police officer or a city may encourage future compliance with the rule, but its deterrent effect by retroactive application is highly questionable. Modifying one's behavior to comply with a future change of a rule, particularly an unforeseeable change, is difficult if not impossible. Retroactive application of *Garner* would, therefore, have little, if any, effect of furthering the deterrent goal of *Garner*.

Nor is the majority's balancing of the equities appropriate under the third prong of *Chevron Oil*. As the *Pembaur* dissent recently observed:

> [R]etroactive application . . . in this context would produce substantial inequitable results by imposing liability on local government units for law enforcement practices that were legitimate at the time they were undertaken. See *Griffin v. Illinois*, 351 U.S. 12, 26, 76 S.Ct. 585, 594, 100 L.Ed. 891 (1956) (Frankfurter, J., concurring in the judgment) ("We should not indulge in the fiction that the law now announced has always been the law. . . ."). Civil liability should not attach unless there was notice that a constitutional right was at risk. *Procunier v. Navarette*, 434 U.S. 555, 562, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978).

Pembaur, 105 S.Ct. at 1306 (Powell, J., dissenting) (joined by Burger, C.J., and Rehnquist, J.). That reasoning applies with equal force in this case because the City of Chattanooga was justified in relying on the apparently established constitutionality of the Tennessee fleeing felon rule under Sixth Circuit rulings, a three-judge district court decision in the circuit, and the nearly unanimous judicial approval of the common law rule. To change the rule retroactively to the detriment of defendants and hundreds of other municipalities that would be adversely affected by such a ruling would be unfair.

The majority also found support for retroactive application in the fact that the *Garner* Court applied its ruling to the case before it. *See Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (en banc). Our rationale in *Smith*, however, is inconsistent with the *Chevron* standards. This inconsistency is set out in the concurring and dissenting opinions in *Smith*, particularly in the opinions of Judges Merritt and Krupansky at pages 376 and 379. The simplistic analysis of retroactivity made in *Smith* was first adopted by the Second Circuit in *Welyczko v. U. S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 105 S.Ct. 512 (1984), but has subsequently been questioned by that court in *Byrne v. Buffalo Creek R.R.*, 765 F.2d 364 (1985)[2]. *Smith*'s view of retroactivity would pre-

[2] At the same time, it is well recognized that, in the interest of justice, courts may exclude certain cases from the retroactive application of a judicial decision. *See Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed. 647 (1969). In determining whether to do that, they consider three factors: 1) whether the judicial decision establishes a new principal of law; 2) whether retroactive operation would advance or inhibit the new ruling's effect; and 3) whether retroactive operation "could produce substantial inequitable results." *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-09, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971) (quoting *Cipriano*, 395 U.S. at 706, 89 S.Ct. at 1900). Although we noted in *Welyczko* that the six-month statute of limitations for wrongful discharge and unfair representation cases ought to be applied retroactively

clude meaningful and sensitive consideration and analysis of factors that may counsel against retroactive application as set out in *Chevron Oil*. I simply do not believe that the Supreme Court has decided that *Chevron* standards have been set aside whenever the Supreme Court applies an arguably new rule of law to the parties before it. See *Gurish* v. *McFaul*, No. 84-3036 (6th Cir. 1986), wherein this court recognized that "federal courts generally have applied the three part test of *Chevron*" in determining whether a civil decision of the Supreme Court is to be applied retroactively, citing *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87-88, 92 (1982), and other cases from this court.

Thus under the *Chevron Oil* analysis mandated by the Supreme Court, *Garner* should not be applied retroactively because of the City's justifiable reliance on the Tennessee statute, the negligible impact retroactive application would have on the *Garner* rule's purpose, and the great inequity municipalities would suffer if *Garner* is applied retroactively.

Finally, even if the panel majority's retroactivity analysis were correct, I disagree with the majority's conclusion that the district court erred in not granting a j.n.o.v. This conclu-

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without regard to the above three-factor analysis, neither that holding nor *DelCostello* itself foreclosed the possibility of there ever being a case in which, because of special circumstances, we would find that the retroactive application of the six-month statute of limitations would be appropriate.

Bryne v. Buffalo Creek R.R., 765 F.2d 364, 366 (2d Cir. 1985) (applying *Chevron Oil*). For a recent Second Circuit decision stating that *Chevron Oil* still governs retroactivity analysis in civil cases despite the fact that the Supreme Court applied the rule to the case before it, see *Gargiul v. Tompkins*, 790 F.2d 265, 274 (2d Cir. 1986).

Since the Second Circuit's decision in *Welyczko* and the Sixth Circuit's holding in *Smith*, only one other court has addressed whether *DelCostello* was to be given retroactive effect. *Zemonick v. Consolidation Coal Co.*, ___ F.2d ___, No. 84-1353 (4th Cir. July 28, 1986).

sion fails to give the appropriate weight to the evidence from which the jury reached its decision. Reasonable minds could differ on whether deadly force could be constitutionally used against the decedent in this case. The shooting officer testified that after the window had been broken in the burglarized house, he observed that the fleeing decedent had an unknown object in his hand. Only after the shooting did the officer learn that the object was not a weapon. Moreover, police experience taught that many or most burglars are armed and dangerous.

Despite the panel majority's imposition of its own interpretation of the evidence, the jury inferred, after being given instructions in accordance with *Garner's* guidelines, that the evidence supported a justifiable basis for use of deadly force under these circumstances. I cannot say as a matter of law that the evidence presented was inadequate to support the jury's decision. I therefore dissent also from that aspect of the majority's decision.

Officer Kyle was deemed to have acted in good faith. He believed that Carter was dangerous, did not know if he was armed, and realized that Carter was caught in the act of burglary and was reacting in desperation to those circumstances. The jury, therefore, construing the evidence most favorable to the City, might be allowed to find the City not liable even under *Garner* standards. The emphasis in *Garner*, as noted by the majority, was on the suspect's youth and the fact that he was unarmed. "[T]he armed burglar would present a different situation." 105 S.Ct. at 1706. Kyle himself felt that he had probable cause to believe Carter may have been armed. The police officer in such a situation should not be judged in light of hindsight when it was later discovered that Carter was unarmed.

I would affirm the decision of the district court.

Nos. 84-5247/5276

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROSA CARTER, Administratrix of the Estate of Adrian Miles Carter, deceased,
Plaintiff-Appellant, Cross-Appellee,

v.

CITY OF CHATTANOOGA, TENNESSEE,
Defendant-Appellee, Cross-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed June 27, 1988

Before: ENGEL, Chief Judge*; LIVELY, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges.

WELLFORD, J., delivered the opinion of the court in which ENGEL, CJ., KENNEDY, KRUPANSKY, GUY, NELSON, RYAN, BOGGS and NORRIS, JJ., joined.

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*The Honorable Albert J. Engel assumed the duties of Chief Judge effective April 1, 1988.

MERRITT, J. (pp. 39-56) delivered a separate dissenting opinion, joined by LIVELY, KEITH, MARTIN and JONES, JJ. MARTIN, J., (p. 57) also delivered a separate dissenting opinion.

WELLFORD, Circuit Judge.

I. *BACKGROUND*

Adrian M. Carter was shot and killed by a Chattanooga police officer, Paul Kyle, on December 21, 1982 as he fled from the scene of a burglary. Carter's mother as administratrix brought suit against the officer and the City under 42 U.S.C. § 1983, claiming a violation of the Fourteenth Amendment right of due process of law. At the time, there was in effect in Tennessee a so-called "fleeing felon" statute, TCA 40-808 (1975), recodified in 1982 as TCA 40-7-108.[1] This law had been in effect in Tennessee for many years, and authorized the use of deadly force as a reasonable last resort to apprehend a fleeing felon after notice of intent to arrest. Prior to the trial of the issues in this case, we decided *Garner v. Memphis Police Department*, 710 F.2d 240 (6th Cir. 1983), *aff'd sub nom. Tennessee v. Garner*, 471 U.S. 1 (1985), which held that this Tennessee statute, and a City of Memphis policy based thereon, could not constitutionally be applied under the Fourth Amendment to a "seizure," a fatal shooting of a suspect, even if reasonably believed to have committed a felony, under certain circumstances. (The circumstances in *Garner* were that the fleeing suspect who was shot and killed by police was a minor who was neither armed nor otherwise apparently dangerous and who had not, to the knowledge of the pursuing police, been involved in a crime involving serious harm or violence to others.)

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[1]TCA § 40-7-108 provides:

> *Resistance to officer.*—If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

Our 1983 decision in *Garner* came about following our remand of the issues to the district court at 600 F.2d 52 (6th Cir. 1979).[2] Following *Garner II*, the district court permitted the plaintiff to amend her complaint to assert a Fourth Amendment claim, but it denied plaintiff's motion for a summary judgment on the issue of liability. Both the individual police officer, Kyle, and the City of Chattanooga also moved for summary judgment. Based on his claim of qualified immunity, the district court granted the officer's summary judgment motion, while at the same time denying the City's motion on the grounds that application of *Garner II* precluded this action. At the trial in January of 1984, the district court instructed the jury based on principles set out in *Garner II*, which had been finally decided by this court only a few months before the trial. The jury returned a verdict for the City, and plaintiff has appealed.[3]

Facts in this case are set out based on essentially uncontradicted testimony. There is no dispute but that Adrian Carter and an associate had broken into a Chattanooga residence and were in the process of a burglary when interrupted by the arrival of the uniformed police alerted by activation of a silent burglar alarm. Both Carter and his cohort in crime attempted to escape when they saw the police, and the latter was apprehended at the scene. Carter, however, jumped from a second floor porch to the ground and ignored a call[4] to halt by Kyle, an experienced police officer with more than twenty years of service, who then shot the fleeing Carter. Kyle testified that he noticed that Carter had an object in his hand that Kyle could not identify as Carter ran in a crouched posi-

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[2]We refer to the decision reported at 600 F.2d 52 as *Garner I*; the one at 710 F.2d 240 as *Garner II*.

[3]A panel of this court considered the appeal and reached a decision reported in 803 F.2d 217 (6th Cir. 1987). That decision has been vacated by our decision to hear this case *en banc*.

[4]The warnings given by the police were: "Halt, halt, or I'll shoot."

tion from the burglary scene.[5] Kyle shot Carter at a distance of some fifteen to twenty yards and made no attempt to chase him while shouting the warning to stop. Kyle had cautioned another officer at the burglary scene not to enter the house at the place where the burglar or burglars had apparently broken in, because he felt it was too dangerous. The jury rendered a verdict for the City.

The plaintiff appealed from the jury verdict for the defendant City and from the district court's refusal to grant a judgment notwithstanding that verdict and/or to grant for a new trial. (No appeal was taken from the grant of summary judgment to defendant Kyle.)

The district court in this case declined to grant either of the remaining parties' motions for summary judgment holding that the principles set out in *Garner II* should be retroactively applied and that there were material issues to be submitted to the jury which had been requested by defendant. Judge Milburn, the trial judge, after overruling the parties' motions for a directed verdict, instructed the jury accordingly and the jury returned a verdict for the defendant City. Plaintiff moved in the alternative for a judgment notwithstanding the verdict and/or for a new trial. The district court denied these motions and judgment was entered for the City based upon the sufficiency of evidence to support the verdict and that "reasonable minds" could have reached "different conclusions" on that evidence. Plaintiff now appeals from the entry of judgment for defendant City and the court's refusal to grant her post-verdict motions.

Subsequent to the appeal taken by plaintiff, the Supreme Court affirmed our decision in *Garner II* in a decision reported as *Tennessee -- v. Garner*, 471 U.S. 1 (1985), which held that the Fourth Amendment prohibited the use of deadly force under the circumstances of that case. Use of such force

[5]The object was later found to be some kind of cloth.

was permissible only if used as a last resort to prevent escape of a suspect, when the police officer had probable cause to believe that he was a felon, gave a warning where feasible, and the suspected felon posed a direct threat of death or serious injury to the officer or to others in the community. The court put it succinctly that "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead," but it refused, at the same time, to rule that Tennessee's fleeing felon statute, relied upon here by the City of Chattanooga, was "unconstitutional on its face." 471 U.S. at 11.

II. RETROACTIVITY OF GARNER II

Plaintiff argues that *Tennessee v. Garner* standards properly should have been retroactively applied to this case, and that by reason of such application, she should have been granted either a summary judgment on the question of liability or a judgment notwithstanding the verdict. In considering the issue of whether or not to apply retroactively a decision in a civil case, we look to *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), which enunciated a three part analysis:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . ., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively,

> there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07 (citations omitted).

These standards enunciated in *Chevron Oil* have been repeatedly reaffirmed and clarified as applying the appropriate principles in civil cases of this kind:

> In the civil context, in contrast, the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. See *e.g., Chevron Oil Co. v. Huson,* 404 U.S. 97, 106 [92 S. Ct. 349, 355, 30 L.Ed.2d 296] (1971). Once it has been determined that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application. *Id.,* at 106-107 [92 S. Ct. at 355-56]. See also *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 499 [88 S. Ct. 2224, 2234, 20 L.Ed.2d 1231] (1968).

United States v. Johnson, 457 U.S. 537, 550 n.12 (1982). *See also Goodman v. Lukens Steel Co.,* _ U.S. _, 107 S. Ct. 2617, 96 L.Ed.2d 572 (1987); *Saint Francis College v. Al-Khazraji,* _ U.S. _, 107 S. Ct. 2022, 93 L.Ed.2d 21 (1987); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982); *McSurely v. Hutchison,* 823 F.2d 1002 (6th Cir. 1987).

The initial hurdle that must be overcome before a court ruling is given nonretroactive effect is a determination of

whether the decision marks a "new principle of law, either by overruling clear past precedent on which litigants may have relied . . ., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Chevron Oil*, 404 U.S. at 106.

The Supreme Court has defined more precisely when a "new principle of law" is established, or when a clear break from prior law has come about.

> In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," . . . unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one. . . ." Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, . . . disapproves a practice this Court arguably has sanctioned in prior cases, . . . or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.

Johnson, 457 U.S. at 551 (citations omitted).

The underlying concern expressed in these cases is the inequity and harshness retroactive application of a new rule of law would impose on parties who had no significant reason to doubt the validity or constitutionality of a statute or practice. A review of the fleeing felon rule's history indicates that *Garner* overturned "a longstanding and widespread practice" the Supreme Court had previously not addressed, "but which a near-unanimous body of lower court authority ha[d] expressly approved." *Id.* at 551.

The fleeing felon rule originated early at common law and still constituted the law after nearly two hundred years in this country in approximately one half of the states, including

Tennessee at the time *Garner* was decided. *Garner*, 471 U.S. at 16 n.14-16. Tennessee was one of nineteen states that had codified the principle. Legislatures in some states had abandoned the rule by opting for the Model Penal Code language or had curtailed the rule by permitting use of deadly force only in certain circumstances. *Id.* at 17 n.17-18. Significantly, none of the states that had abandoned the common-law rule cited any constitutional basis for their decisions, but concluded as a matter of their own policy that the old rule should be replaced or modified. *See Garner*, 471 U.S. at 15-19; *see also Sauls v. Hutto*, 304 F. Supp. 124, 131 n.18 (E.D. La. 1969) (quoting Prof. Wechsler's statement of the basis for the Model Penal Code position: "[t]he preservation of life has such moral and ethical standing in our culture and society, that the deliberate sacrifice of life merely for the protection of property ought not to be sanctioned by law" (*quoting from* 1958 American Law Institute Proceedings at pp. 285-86)).

Prior to this court's *Garner II* decision, no court had struck down the fleeing felon rule as unconstitutional as an unreasonable search and seizure under the Fourth Amendment. To the contrary, on three occasions the Tennessee statute was upheld as constitutional by this court or by a three-judge district court convened to determine the statute's constitutionality.

The first case to examine the Tennessee statute in light of a constitutional challenge was *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971), decided by a three-judge panel consisting of Circuit Judge Harry Phillips, then Chief District Court Judge Bailey Brown, and District Judge Robert McRae. Plaintiffs in *Cunningham* brought a wrongful death action under 42 U.S.C. § 1983 against police officers, the police director, and the mayor and also challenged the constitutionality of the Tennessee fleeing felon statute. The three-judge panel was convened "to hear and determine *only* the question of the facial constitutionality of the involved

statute." *Id.* at 1074 (emphasis added). Plaintiffs attacked the statute as violative of the Eighth Amendment's prohibition against cruel and unusual punishment; as unconstitutionally vague and overbroad; as a denial of Sixth Amendment rights to trial by jury, to confrontation of witnesses, and to assistance of counsel; and as a denial of equal protection. That court rejected these numerous constitutional arguments and held that the statute is not "unconstitutional on its face." *Id.* at 1076.

Cunningham involved a burglary suspect shot and killed by Memphis police officers "while . . . investigating a burglary attempt." *Id.* at 1074. The court set out the principle of law applicable:

> The involved statute, T.C.A. § 40-808, originally enacted in 1858, provides in its entirety as follows:
>
> "40-808. Resistance to officer.—If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."
>
> It is agreed by all parties that, as construed by the Tennessee courts, this statute means, in the present context, that an officer may use force that may result in death in preventing the escape of a person that he is attempting to arrest if (1) he reasonably believes that the person has committed a felony and (2) he notifies the person that he intends to arrest him and (3) he reasonably believes that no means less than such force will prevent the escape. The parties also agree that, so construed, the statute merely states the common law. Reneau v. State, 70 Tenn. 720 (1879); Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921); Scarbrough v. State, 168 Tenn. 106, 76 S.W.2d 106 (1934); Johnson v. State, 173 Tenn. 134, 114 S.W.2d 819 (1938).

Id. at 1074-75.

The attorneys involved in *Cunningham* for plaintiff included, among others, Jack Greenberg and Drew Days, III, experienced civil rights advocates. In addressing the numerous contentions of unconstitutionality in the shooting and killing of a burglary suspect, the court recognized that in shooting a fleeing felon, as authorized by the longstanding Tennessee law and common law, a police officer acting on behalf of a municipality was acting at risk if he were deemed by a trier of fact not to have complied with the conditions of the statute earlier specified.

> It is also true that, under this statute, in determining that extreme force can be used, it must reasonably be ascertained that less force will not prevent escape, but this standard of conduct is not so vague as to require an officer to guess as to its meaning. It is true that a great deal of responsibility and authority is placed by the statute in the hands of the arresting officer, but if it is determined later by a trier of the fact that the officer made the wrong decision, he may be subjected to civil and even criminal liability.

323 F. Supp. at 1076.

One year after the court reached its decision in *Cunningham*, this court addressed this issue, concluding significantly:

> This Statute [Tennessee's fleeing felon statute] has been recently construed and found to be constitutional by a Three-Judge District Court. *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D Tenn. 1971). *In any event the police officers were entitled to assume the constitutionality of the Tennessee Statute. "State statutes like federal ones are entitled to the presumption of constitutionality until their invalidity is judicially declared."*

Beech v. Melancon, 465 F.2d 425, 426 (6th Cir. 1972), *cert denied*, 409 U.S. 1114 (1973) (citations omitted; emphasis

added). In a concurring opinion, however, Judge McCree expressed his own reservation about the constitutionality of the rule. Judge McCree did, however, express a belief that the officers' conduct "satisfied constitutional standards in this case." *Id.* at 426.

Melancon, once again, involved the shooting of suspects attempting to flee from the scene of a burglary at a Memphis filling station after the suspects ignored warnings by police officers to halt. The same group of attorneys, including Mr. Greenberg and Mr. Days, represented the plaintiff.

Once again this court examined the Tennessee statute in *Wiley v. Memphis Police Department*, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977). In *Wiley* police officers shot and killed a nighttime burglar who tried to flee when the officers caught him in the act of burglary. In reiterating the constitutionality of Tennessee's statute, the panel emphasized that the statute had twice been upheld as constitutional in *Cunningham* and *Beech* and that the statute's "invalidity, or that of a similar statute, up to [the time of the shooting] had never been declared by any Court." *Id.* at 1250-51. Turning its attention to the four-to-three en banc Eighth Circuit decision in *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976), *vacated as moot sub nom. Ashcroft v. Mattis*, 431 U.S. 171 (1977), which had found the fleeing felon rule violative of substantive due process, the panel strongly criticized the *Mattis* majority:

> The Eighth Circuit is the only Court to our knowledge which has ever held that such a statute, which is so necessary even to elementary law enforcement, is unconstitutional. It extends to the felon unwarranted protection, at the expense of the unprotected public.
>
> We agree with the dissent in the Eighth Circuit case (*Mattis v. Schnarr*), which was highly critical of the majority opinion for not following the deci-

> sions of other Circuits and for embarking on a new course which should have been left to the state legislatures where it belongs.

548 F.2d at 1252.[6] Concluding that the statute was constitutional, the panel found:

> We are of the opinion further that MPD, the City, the Mayor, and the former Mayor, and the Chief of Police had the same right to rely on the law of Tennessee and the decisions of this Court and the decision of the three-Judge Court in formulating their policies. Also, *they could rely on the presumption that the Tennessee statute was constitutional and on the fact that no court at that time had ever held that statute or a similar statute to be unconstitutional.*

Id. at 1254 (emphasis added).

A Memphis firm that had been involved in *Cunningham* and Mr. Greenberg, among others, represented the *Wiley* plaintiff. *Wiley* was concerned with the flight from an apparent burglary of a store in Memphis and the shooting from a distance of some 200 feet of one of the youthful suspects who ignored repeated commands to halt his flight. Nearby guns were found taken from the store, but the suspect was not armed when shot although we stated in *Wiley* that the officers might have assumed that the suspect was armed. *Id.*

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[6]None of the cases cited, which discussed the § 1983 liability of a police officer or municipality, made reference to the case of *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970). That case considered the shooting of a youthful unarmed black, who "had committed no crime nor was he ever charged with one," 424 F.2d at 1229, and who had been cornered and wounded "accidentally" by defendant officer. *Jenkins* is clearly inapposite, although a divided court made reference to a possible Fourth Amendment violation in the case of an officer guilty of "gross or culpable" conduct, in a situation involving "raw abuse of power" with clear racial overtones. 424 F.2d at 1232.

at 1253. *Wiley* cited *Qualls v. Parrish*, 534 F.2d 690, 694 (6th Cir. 1976), for the following proposition:

> Our principal reason for agreeing with the district court that the Tennessee rule should be made the federal rule in this case is that a decision to the contrary would be unfair to an officer who relied, in good faith, upon the settled law of his state that relieved him from liability for the particular acts performed in his official capacity. Most of the state courts that have considered this question follow the old common law rule that deadly force may be used by a police officer only when he has reasonable grounds to believe that the person he is attempting to arrest has committed a felony.

548 F.2d at 1253.

Qualls noted that most of the states, like Tennessee, followed the "old common law rule" that deadly force might be used by an officer against fleeing felons when "he has reasonable grounds to believe that the person he is attempting to arrest has committed a felony." 534 F.2d at 264 (also noting different positions of ALI Model Penal Code § 3.07 and Restatement I of Torts § 131). *Jones v. Marshall*, 528 F.2d 132 (2d Cir. 1975), reached the same result by interpretation of Connecticut law, similar to the common law on apprehension of fleeing felons, to sustain the good faith defense of a police officer as a matter of law in a 42 U.S.C. § 1983 suit brought on behalf of a youthful unarmed offender killed while fleeing after theft of a car. The court came to this conclusion reluctantly because the fleeing suspect was only 16 years old and had not been warned that if he did not halt he might be shot. The *Jones* court stated that it preferred the rule that was later adopted by the Supreme Court in *Garner* but found no constitutional violation in the Connecticut law similar in effect to the Tennessee fleeing felon rule, stating

> We are today interpreting § 1983, and within that statute the states must be given some leeway in the administration of their systems of justice .... We cannot conclude that the Connecticut rule [on the arresting officer's use of deadly force] is fundamentally unfair."

Id. at 142.

We have traced the history of three § 1983 cases from our circuit during the period from 1971 through 1977 where actions by police officers under color of T.C.A. § 40-7-108 were held to be constitutional in the face of a number of challenges. These suits were handled by able civil rights attorneys who asserted a number of different federal constitutional challenges to the use of deadly force upon fleeing burglary suspects in Tennessee. The factual circumstances in *Cunningham*, *Melancon*, and *Wiley* were not materially dissimilar from the factual circumstances in *Garner*. Certiorari was denied following our decisions in *Melancon* and *Wiley*. In 1977 we also made it very clear that we did *not* adhere to the reasoning of the Eighth Circuit in *Mattis v. Schnarr*, a case *vacated* by the Supreme Court that same year, and one which we described in *Wiley* as the *only* court to hold that a statute similar to T.C.A. § 40-7-108 might be unconstitutional if applied to an unarmed, apparently nondangerous, fleeing felon.

At about the same time that *Jones v. Marshall* was decided, another circuit court affirmed dismissal of a § 1983 cause of action brought by parents against a police officer and a municipality, charging the defendants with unconstitutional use of deadly force in the fatal shooting of their son while he was attempting to flee from a burglary. *See Wolfer v. Thaler*, 525 F.2d 977 (5th Cir.), *cert. denied*, 425 U.S. 975 (1977).

As pointed out, *Mattis v. Schnarr*, a majority decision with reasoning contrary to that of the Sixth Circuit, was later vacated by the Supreme Court and had no further preceden-

tial effect. In *Wiley*, we expressly adopted the minority view of *Mattis*.[7] Until the 1979 panel decision in *Garner I* then, there was clearly established authority in this circuit, and in almost all other courts that had considered the question, that the ancient fleeing felon rule adopted in Tennessee was constitutional, and that the use of deadly force as a last resort to prevent escape of a fleeing felony suspect was not actionable under § 1983. *Garner I* held that the Memphis police officer was immune from liability based on good faith reliance on Tennessee law, but remanded the case for reconsideration in light of the intervening Supreme Court decision, *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

This court in *Garner I* recognized the longstanding common law principle that the Tennessee statute in controversy embodied. As Professor Wayne R. LeFave acknowledged:

> Under common law, an officer is justified in using reasonable force to make a lawful arrest; this may include deadly force, if reasonably believed necessary, to prevent the escape of a person fleeing from a felony arrest . . . .
>
> The argument that the common law rule is unconstitutional under the *Rochin v. California*, 342 U.S. 165 (1952), shocks the conscience test has not prevailed.

2 W. LaFave, *Search and Seizure* § 5.1(d) at 238, 239 (1978).

This same rule was set out in respect to pursuit of a remedy against an officer who shot and killed a fleeing moonshiner in *Stinnett v. Virginia*, 55 F.2d 644, 646 (4th Cir. 1932):

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[7]In *Landrum v. Moats*, 576 F.2d 1320 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978), applying Nebraska fleeing felon law, which was different from the common law in effect in Tennessee and in Missouri, that court reiterated its prior fleeing felon rationale.

> As the deceased, according to the testimony of the defense, had unquestionably committed a felony in the presence of the officers, they had the right to arrest him and to use such force as under the circumstances appeared reasonably necessary to effect his arrest or to prevent his escape. And it is a well-settled rule of law that, if the reasonable use of such force results in the death of the felon, the officers may not be held liable therefor. 1 East, 298; Foster's Crown Law 271, 1 Hale P.C. 489; Ex parte Warner, (D.C.) 21 F.(2d) 542; State v. Garrett, 60 N.C. 144, 84 Am. Dec. 359; State v. Roane, 13 N.C. (2 Dev.) 58; State v. Evans, 161 Mo. 95, 61 S.W. 590, 84 Am. St. Rep. 669; 2 R.C.L. 471; 13 R.C.L. 876, note, 17 Ann. Cas. 900.

Stinnett v. Virginia, 55 F.2d 644, 646 (4th Cir. 1932). *See also Green v. State*, 91 Ark. 510, 121 S.W. 727, 728. To the same effect, see Pearson, *The Right to Kill in Making Arrests*, 28 Mich. L. Rev. 957, 964 (1930); Note, *Justification for the Use of Force in the Criminal Law*, 13 Stanford L. Rev. 566 (1961); R. Perkins & R. Boyce, *Criminal Law* 1098-1102 (3d ed. 1982); and 14 *Crim. L. Bull.* 285 (1978).

It must be frankly acknowledged that there was substantial inconsistency between the holding in *Wiley* in 1977 and the decision in *Garner I* some three years later. *Wiley* involved individual police officers and the same municipal defendants as did *Garner*. It was stated in *Wiley*:

> We are of the opinion further that MPD, the City, the Mayor, and the former Mayor, and the Chief of Police had the same right to rely on the law of Tennessee and the decisions of this Court and the decision of the three-Judge Court in formulating their policies.

548 F.2d at 1254.[8]

Despite this language (and the style of *Wiley*), the panel in *Garner I* indicated that the prior decisions referred to in *Wiley* as determinative of the constitutionality of T.C.A. § 40-7-108 did not establish that law's constitutionality because "those cases dealt with actions against individual officers under § 1983, and not liability based on the 'policy or custom' of a governmental entity." 600 F.2d at 54. Yet it seems clear on reflection that *Wiley* did indeed deal with, and discuss, formulation and carrying out of Memphis Police Department policy based on the aforesaid Tennessee statute and the common law, then in force in a majority of states. A judge, in analyzing this apparent inconsistency after considering *Wiley* and other decisions to the same effect in this circuit and *Garner I*, stated that "other panels of the Court might prefer a different result," but concluded that "it is impossible to conclude that the Sixth Circuit has not spoken on the issue of the constitutionality of the fleeing felon rule." *Truss v. Collier*, 574 F. Supp. 1249, 1260 (S.D. Ohio 1983) (J. Rice). In *Truss*, although the district judge indicated that he preferred a different result, the court decided that the City of Springfield, Ohio, and an individual police officer, sued under § 1983 based on claimed constitutional violations, were not liable for use of deadly force on a fleeing burglary suspect. The Ohio city and its officers, like Memphis and its officers, followed a common law rule, although Ohio's rule had not been codified.

Another student of the then clearly existing status of the law *prior* to *Garner II* reached the same conclusion that Judge Rice reached in *Truss v. Collier*. *See* Note, *The Unconstitutional Use of Deadly Force Against Nonviolent Fleeing Felons*:

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[8]MPD refers to the Memphis Police Department; the "City" to Memphis. The three-judge court decision was *Cunningham v. Ellington*, *supra*.

Garner v. Memphis Police Department, 18 Ga. L. Rev. 137, 144 n.30 (1983). The dissenting opinion in *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1974) (en banc) (4-3 decision), which was adopted as stating the correct view of the law by this court in *Wiley*, 548 F.2d at 1252, observed:

> Indeed, prior to this decision, no court has held that the modification of a statute of this sort falls within the judicial purview delimited by the separation of powers contained in our Constitution.
>
> . . . On the other hand, the majority does not cite, nor can I find, any state where the common law rule on the use of deadly force, either codified or uncodified, has been invalidated by either a state or federal court. Those courts faced with attacks on the common law rule allowing all force reasonably necessary to effect the arrest of fleeing or resisting felons have consistently held that these attacks present policy questions for the legislature, not the judiciary. *Jones v. Marshall*, 528 F.2d 132 (2d Cir. 1975); *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971) (three-judge court); *Hilton v. State*, 348 A.2d 242 (Me. 1975); *Shumann v. McGinn*, [307 Minn. 446], 240 N.W.2d 525 (Minn. 1976).

547 F.2d at 1021-22 (Gibson, C. J., Stephenson, J., and Henley, J., dissenting).

On remand from this court in *Garner I*, the district judge relied specifically on *Cunningham*, which had not been distinguished in *Garner I*, holding that the City of Memphis and its police department were not liable, and responded to the questions posed by the *Garner I* panel. (C-75-145, opinions, 2/29/80 and 7/8/81, W. D. Tenn.).

The question posed for remand in *Garner I* did not serve as notice to cities such as Chattanooga that the fleeing felon rule was constitutionally infirm. The question put on remand

was: "[I]s a municipality's use of deadly force under Tennessee law to capture allegedly nondangerous felons fleeing from nonviolent crimes constitutionally permissible under the fourth, sixth, eighth and fourteenth amendments?" 600 F.2d at 55 (footnote omitted). *Garner I* did not discuss precedential decisions indicating that the rule was not constitutional; the court merely inserted a footnote citing various cases including the Second and Eighth Circuit cases previously discussed. Additionally, the panel noted two law journal articles, one of which raised the Fourth Amendment as a possible basis for striking down the common law rule. *Id.* n.2, 3; *see* Comment, *Deadly Force to Arrest: Triggering Constitutional Review*, 11 Harv. C.R.-C.L.L.Rev. 361 (1976). In light of all the cases reaching an opposite conclusion on the constitutionality of the fleeing felon rule, and particularly in light of prior authority in this circuit, *Garner I*'s formulation of the question on remand surely cannot be viewed as a foreshadowing of the rule's demise. To the contrary, *Garner I* gave the cities and their police departments no reasoned basis to conclude that prior decisions of this court that the Tennessee fleeing felon statute was constitutional were destined to be overruled.

This conclusion is supported by two law review articles appearing after the Supreme Court decided *Tennessee v. Garner*. These articles determined after detailed research that the constitutional analysis in *Garner* was both novel and a clear break from past precedent:

> The Supreme Court's affirmance in *Garner* represents an unexpected, but nonetheless logical, extension of existing fourth amendment jurisprudence. The decision was *unexpected* both because the Burger Court has generally curtailed the scope of fourth amendment protections and because *the federal and state courts have been almost unanimous in upholding similar deadly force rules. The case also charted new territory* because the Court had never before

> held the means of arrest unreasonable when the officer had probable cause to believe the suspect had committed a crime. In addition, the Court for the first time explicitly recognized that the fourth amendment protects an individual's interest in life as well as her interests in property and privacy.

The Supreme Court - Leading Cases, 99 Harv. L. Rev. 120, 248 (1985) (emphasis added) (footnotes omitted). Similarly, a comment in the *University of Cincinnati Law Review* described *Garner II* as a "bold and pioneering step" and noted that prior to the 1983 Sixth Circuit ruling, "[e]xcept for one decision that was later vacated by the Supreme Court . . . the federal courts consistently had declined to hold that the application of the fleeing felon doctrine resulted in unconstitutional deprivations." Comment, *Tennessee Code Section 40-7-108 Authorizing the Use of Deadly Force by Police Officers Against an Unarmed Suspect of a Nonviolent Felony Is Unconstitutional under The Fourth and Fourteenth Amendments*—Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983), 52 U. Cin. L. Rev. 1154, 1159, 1167 (1983).

A main purpose of *Garner*, one of obvious and important value, was to deter conduct of municipalities in the use of deadly force under circumstances where the fleeing felon was reasonably believed to present no threat to the arresting officer or to the community. Another purpose, of course, was to provide compensation to victims who could prove that they posed no threat and who could establish that they were proximately caused injury by reason of the carrying out of a municipal policy which violated their constitutional rights. The two-prong and proper effect of the *Garner* decision, then, is to deter municipal officials and to provide compensation to victims in appropriate cases by prospective application of the new principles enunciated by the Supreme Court.

We conclude, therefore, that the first standard enunciated in *Chevron Oil* was satisfied. *Garner II*, as affirmed in

Tennessee v. Garner, established a new and unexpected principle of law by setting aside clearly established precedent, particularly in this circuit, on which the City of Chattanooga and its police officers had a right to rely when this most unfortunate episode occurred in 1982. If it did not overrule a clearly established precedent in the Supreme Court, *Tennessee v. Garner* decided "an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106.[9]

Next we must consider whether retroactive application of *Garner* would further or retard the operation of the Court's ruling. We make this determination " 'by looking to the prior history of the rule in question [and] its purpose and effect. . . .' " *Chevron Oil*, 404 U.S. at 107 (*quoting Linkletter v. Walker*, 381 U.S. 618, 629 (1965)).

Proof of improper use of deadly force may result in compensation to the decedent's estate, but this result is merely a consequence of applying the *Garner* rule. An award of damages against a police officer or a city may encourage future compliance with the rule, but its deterrent effect by retroactive application is highly questionable. Modifying one's behavior to comply with a future change of a rule, particularly an unforeseeable change, is difficult if not impossible. Retro-

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[9]The dissent in *Tennessee v. Garner* emphasized that the Court had effectively created a new Fourth Amendment right, and cited the contrary policy consideration in *Wiley*, in which certiorari had been denied in 1977. The dissent also observed critically that the majority had decided to be unconstitutional for the first time a practice which "predates enactment of the Bill of Rights and continues to be accepted by a substantial number of the States," and cited *Cunningham v. Ellington*, 471 U.S. at 28, 30. It is interesting that the majority opinion in *Tennessee v. Garner* cited none of the Sixth Circuit authority discussed herein or *Cunningham*; rather, it made reference to *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976), which it had vacated in 1977. 471 U.S. at 19; see also 471 U.S. at 18 n.21, which referred to the *Mattis* dissent.

active application of *Garner* would, therefore, have little, if any, effect of furthering the deterrent goal of *Garner*.

We find that the second part of the *Chevron Oil* analysis is, at best (from the plaintiff's standpoint) inconclusive. There was no reasonable basis under the law or precedential authority at the time for Chattanooga officials to doubt the constitutionality of the fleeing felon rule in Tennessee. The law in effect did not permit use of deadly force unless reasonably necessary as a matter of last resort to prevent the escape of a suspected felon after a warning. The officer's conduct was subject to a reasonableness standard. The primary reason for imposing § 1983 liability on a municipality is deterrence. *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980). The remand in *Garner I* was ordered in light of *Monell*. Ultimately, in *Tennessee v. Garner*, the Tennessee statute, and by inference the policy it represents, was not found to be facially unconstitutional, but was "invalid insofar as it purported to give Hymon [the Memphis Police Officer who shot Garner] the authority to act as he did." 471 U.S. 11, 22. We see little that would further the purpose of deterrence by applying the *Garner* rule retroactively under the circumstances. *Garner II* clearly had prospective effect. *See Robinson v. Bibb*, 840 F.2d 349 (6th Cir. 1988).

Weighing and balancing of the equities in this case in light of the "prior history of the rule in question" (the fleeing felon rule), and "its purpose and effect," we are persuaded that the City of Chattanooga did have a legitimate basis at the time to believe that its policy, in conformity with Tennessee law and longstanding common law, was not unconstitutional. *See Chevron Oil*, 404 U.S. 106. The second standard of *Chevron Oil*, then, was met, and it is appropriate to apply the new principle of *Garner II* and *Tennessee v. Garner* prospectively. The conduct and policy in question in *Garner* and in the instant case were not found by our court or by the Supreme Court to be conduct that shocks the conscience as in *Rochin v. California*, 342 U.S. 165 (1952); rather they were described

as "constitutionally *unreasonable*." 471 U.S. at 11 (emphasis added). The Court noted further that if "there is probable cause to believe that he [the felony suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape. . . ." 471 U.S. at 11. The direction of change of policy in *Garner* was, therefore, not a change to preclude infliction of deadly force on a fleeing felony suspect, but rather to require application of a further reasonableness standard: probable cause to believe that the suspect was a threat to the officer or may have threatened serious harm to others. Prospective rather than retroactive application of that refinement, we believe, would not retard the operation of that new constitutional policy.

Under the third standard of *Chevron Oil* for determining whether to apply a principle or decision retroactively in the civil liability context, we must "weigh the inequity imposed by retroactive application." 404 U.S. 107. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court decided whether the single act of a responsible municipal official might constitute a policy decision within the meaning of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). It held that such action by a municipal "policymaker" may subject the county to § 1983 liability "under appropriate circumstances." 475 U.S. at 480. In *Pembaur*, however, it was noted that not "every act of municipal officers with final authority to effect or authorize arrests and searches represents the policy of the municipality." *Id.* at 486 (White, J., concurring). Liability was based in *Pembaur* upon retroactive application of *Steagald v. United States*, 451 U.S. 204 (1981), and the defendant *did not challenge* and was deemed to have "conceded" the retroactivity of *Steagald*. *See* 475 U.S. at 487-88. Justice Powell, dissenting in *Pembaur*, did discuss the retroactivity question:

> [R]etroactive application . . . in this context would produce substantial inequitable results by imposing liability on local government units for law enforcement practices that were legitimate at the time they were undertaken. See *Griffin v. Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment) ("We should not indulge in the fiction that the law now announced has always been the law. . ."). Civil liability should not attach unless there was notice that a constitutional right was at risk. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

Pembaur, 475 U.S. at 494-95 (Powell, J., dissenting (joined by Burger, C.J., and Rehnquist, J.)).

The jury in this case heard all the evidence, was given instructions which were favorable to plaintiff in applying *Garner II* retroactively, and ruled in favor of the defendant City. It may fairly be said that often the jury generally reflects the conscience of the community, and thus the verdict here may reflect a kind of equitable value judgment. Cities such as Chattanooga are faced with serious risks and burdens in carrying out their police powers under the general Tennessee law and the long established common law as to capture of fleeing felons. The City ought not be deterred in its exercise of what it has good reason to believe is constitutional conduct in the face of repeated and unsuccessful court challenges to the policy it pursued. This was more than merely exercising good faith; it was acting in reliance on what appeared over many years to have been valid and proper state directed police conduct and policy. The burden upon the defendant municipality and others in similar positions if we were to decide that the equities weighed in favor of plaintiff, who had not even raised a fourth amendment claim at the time *Garner II* was decided, would be substantial. A state or city having notice that a given and settled or legal principle will henceforth be considered unenforceable or violative of newly

decided federal constitutional principles may have an opportunity in the future to protect itself against liability by changing its policies thereafter. To impose liability against the City in the present situation would be inequitable and might present severe financial strain in the case of smaller municipalities.

That reasoning applies with equal force in this case because the City of Chattanooga was justified in relying on the apparently established constitutionality of the Tennessee fleeing felon rule under Sixth Circuit rulings, a three-judge district court decision in the circuit, and the nearly unanimous judicial approval of the common law rule. To change the rule retroactively to the detriment of defendants and potentially hundreds of other municipalities that would be adversely affected by such a ruling would be unfair.

There can no longer be support for the view, expressed in *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984) (en banc), that merely because a decision which may establish an entirely new precedent was applied in the case under consideration that it should, *ipso facto*, therefore become controlling automatically and retroactively to all like situations which may have arisen before that decision. That rationale flies in the face of *Chevron Oil*, which has consistently been followed in the consideration and application of standards heretofore discussed. See *Thomas v. Shipka*, 829 F.2d 570, 571 n. 1 (6th Cir. 1987), wherein we stated:

> In *Smith* we developed a rule for determining the retroactivity of Supreme Court decisions predicated upon whether the Supreme Court had applied its decision to the case before it. If it did, we concluded that the Supreme Court was demonstrating its intent that its decision should be applied retroactively. However, the Supreme Court's decision in *St. Francis College* [*St. Francis College v. Al-Khazraji*, _ U.S. _, 107 S. Ct. 2022, 93 L.Ed.2d 21 (1987)], as well

> as its decision in *Goodman* [*Goodman v. Lukens Steel Co.*, _ U.S. _ , 107 S. Ct. 2617, 96 L.Ed.2d 572 (1987)], clearly make the rationale of *Smith* suspect. We conclude that *Smith* can no longer be the law of this circuit in light of the more recent Supreme Court pronouncements.

Shipka involved a careful study and consideration of *Chevron Oil* standards in deciding whether a recently adopted principle in a decision of this court should be applied retroactively to other civil cases. The first factor in *Chevron Oil*, whether there had been "a departure from clear precedent" was considered in *Shipka* to be "most important" and "also inextricably interrelated with the third factor in the *Chevron* analysis which focuses on the equitable considerations involved . . . [and which] is in large part dependent upon the outcome of the analysis under the first part of the test." 829 F.2d at 573, 574. We also considered and applied *Chevron Oil* standards and factors in considering retroactivity of *Wilson v. Garcia*, 471 U.S. 261 (1985), in the recent case of *McSurely v. Hutchison*, 823 F.2d 1002 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1107.

The cases cited in *Thomas v. Shipka, supra*, from the Supreme Court were decided after *Smith v. General Motors, supra*, and each discussed in some detail the applicability of *Chevron Oil Co. v. Huson, supra*. The first of these cases, *St. Francis College v. Al-Khazraji*, _ U.S. _, 107 S. Ct. 2022 (1987), stated:

> But *Chevron Oil Co. v. Huson, supra*, counsels against retroactive application of statute of limitations decisions in certain circumstances. There, the Court held that its decision specifying the applicable state statute of limitations should be applied only prospectively because it overruled clearly established circuit precedent on which the complaining party was entitled to rely, because retroactive appli-

> cation would be inconsistent with the purpose of the underlying substantive statute, and because such application would be manifestly inequitable. The Court of Appeals found these same factors were present in this case and foreclosed retroactive application of its decision in *Goodman*. We perceive no good reason for not applying *Chevron* where *Wilson* has required a Court of Appeals to overrule its prior cases. Nor has petitioner persuaded us that there was any error in the application of *Chevron* in the circumstances existing in this case.

107 S.Ct. at 2025-26.

Following the rationale above expressed, the Court affirmed the Third Circuit and did not apply the "usual rule" that the case should be decided in accordance with the law existing at the time of decision. The Court noted that its decision in *Wilson v. Garcia* required the appellate court to overrule its prior cases; in the controversy at hand, *Garner* effectively overrules prior Sixth Circuit cases, *Cunningham, Melancon, Wiley,* and *Qualls.*[10] This of course, is a different

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[10]*Haislah v. Walton,* 676 F.2d 208 (6th Cir. 1982), decided April, 1982, involved recapturing a fleeing *misdemeanant,* not a fleeing felon, and the use of deadly force under Ohio law in that circumstance. Judge Edwards, a member of the *Garner* panels, in *Haislah* referred to *Garner I* and also to *Wiley, Qualls,* and *Melancon* (not *Cunningham,* but also surprisingly to *Mattis v. Schnarr,* 547 F.2d 1007 (8th Cir. 1976), repudiated by this court in *Wiley*). See also the dissent of Judge Weick in *Hayes v. Memphis Police Department,* 571 F.2d 357 (6th Cir. 1978), *aff'd after remand,* 634 F.2d 350 (6th Cir. 1980). *Haislah* held that it was improper to interject the "fleeing felon" rule through a misleading jury instruction. No issue about the constitutionality of the "fleeing felon" statute of Ohio, much less that of Tennessee, was before this court in *Haislah,* in which there was also a strong dissent. No party in *Haislah* argued that Ohio law justified deadly force to capture one suspected merely of being a misdemeanant. *Haislah* was not cited in *Garner II,* but it was noted in *Truss v. Collier,* 574 F. Supp. 1249 (S.D.

situation from a change in the law made by the Supreme Court while a case is pending on direct appeal from the district court to the court of appeals (as happened in *Garner I* where *Monell v. Dept. of Social Services, supra,* changed the law on municipal liability while *Garner* was on direct appeal). *See United States v. Schooner Peggy,* 1 Cranch 103, 110, 2 L.Ed 49 (1801).

Again, the second Supreme Court case relied upon in *Thomas v. Shipka, supra,* to hold *Smith* no longer to be controlling on this point, was *Goodman v. Lukens Steel Co.*, _ U.S. _ , 107 S.Ct. 2617 (1987). The Court reiterated the rule expressed in *St. Francis College*:

> The usual rule is that federal cases should be decided in accordance with the law existing at the time of decision. . . . But *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), advises that nonretroactivity is appropriate in certain defined circumstances. There the Court held that a decision specifying the applicable state statute of limitations in another context should not be applied retroactively because the decision overruled clear Circuit precedent on which the complaining party was entitled to rely, because the new limitations period had been occasioned by a change in the substantive law the purpose of which would not be served by retroactivity, and because retroactive application would be inequitable.

107 S.Ct. at 2621 (citations omitted).

Ohio 1983), as indicating no change in Sixth Circuit law prior to *Garner II*. It has not been cited in any other fleeing felon case to our knowledge. In fact, after the issue was first decided in *Cunningham,* no case prior to *Garner* in this circuit indicated that the constitutionality of the Tennessee fleeing felon statute was in doubt.

The *Goodman* Court approved retroactivity of its *Wilson* decision because "when the complaint was filed . . . there was no established precedent." *Id.* at 2622. Again, in the instant controversy, when Carter filed her complaint precedent was clear in this circuit that constitutional challenges to Tennessee's fleeing felon were uniformly unavailing. In footnote 8 in *Goodman*, the Court referred to *Smith v. Pittsburgh*, 764 F.2d 188 (3d Cir.), *cert. denied*, 474 U.S. 950 (1985), where the court applied the three-prong *Chevron Oil* standard to decide whether a ruling should be applied retroactively, holding:

> . . . where application of the law had been erratic and inconsistent, without clear precedent on which plaintiff [or litigant] could reasonably rely . . . a subsequent Supreme Court decision on the applicable limitations period cannot be said to have overruled clear past precedent on which the litigants may have relied.

Smith, 764 F.2d at 194-95.

In light of these recent Supreme Court cases, we expressly adopt the reasoning of *Thomas v. Shipka* to the effect that the holding of *Smith v. General Motors* is no longer valid. Accordingly, we have applied the test for nonretroactivity established in *Chevron Oil* to *Garner*, and we have concluded that there was clear and consistent precedent in this circuit upholding the constitutionality of the Tennessee fleeing felon statute prior to *Garner II*.[11]

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[11]There was an entirely different circumstance in the Eleventh Circuit relating to the Alabama fleeing felon statute where there was no prior clear precedent as to its constitutionality. See *Acoff v. Abston*, 762 F.2d 1543 (11th Cir. 1985), and *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985). Neither of these Eleventh Circuit cases cited the Sixth Circuit and other authority herein discussed and relied upon; instead both cited *Mattis v. Schnarr*, 547 F.2d 1007 (8th Cir. 1976), expressly rejected by this court and vacated by the Supreme Court.

Judge Merritt argues in his dissent that *Owen v. City of Independence*, 445 U.S. 622 (1980), narrows the *Chevron* standards for considering retroactivity. One searches in vain, however, for any citation or reference to *Chevron* in the lengthy majority opinion in *Owen* or to any discussion of standards of retroactivity. Simply put, *Owen* decided, counter to what the dissent asserted was the Court's prior precedent, that a municipality may not claim the kind of immunity based on good faith that its officers or agents may claim. Owen was terminated by the city council as police chief allegedly without proper notice or an opportunity to be heard, and he filed a § 1983 action against the city, the city manager, and council members in their official capacities. The case had an interesting procedural history, but after an initial court of appeals' determination to reverse, at least in part, the district court's judgment for the defendant city, it was remanded (as in *Garner*) for further consideration in light of the intervening Supreme Court decision in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). Upon remand, the court of appeals denied any relief against the city "because its officials acted in good faith and without malice." 589 F.2d 335, 338 (8th Cir. 1978). The Supreme Court reversed, discussing in detail the effect of *Monell*, which had overruled the doctrine of *Monroe v. Pape*, 365 U.S. 167 (1961), which held municipalities not liable under § 1983.

It is important to note that the defense of the city and the council in *Owen* was not that it had not "twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name," but rather that its agents had acted in good faith since Owen, they maintained, had no claim which involved a constitutional property or liberty interest. 445 U.S. at 634 n.13. The real defense in *Owen* was not whether the alleged unconstitutional acts of denial of due process had occurred, or whether the alleged violation was the proximate cause of damages, but rather whether under the circumstances a municipality's

defense of good faith immunity could be claimed. The situation as to Carter is different; the City of Chattanooga claims no constitutional violation because the officer had probable cause to act, and because its policy of adhering to the Tennessee law was not the proximate cause of any constitutional injury to Carter. *Owen*, like *Garner*, did apply a "new" constitutional interpretation to the facts before it, but there was no discussion of retroactivity or of *Chevron* standards.

We cannot agree, therefore, that *Owen* narrows and confines the *Chevron* standards dealing with retroactivity of a case involving, as did *Garner*, a new legal principle which overruled clear past precedent and a long history of common law, and/or decided an issue of first impression. *Owen* simply put municipalities on notice that they could be held liable, unlike individuals acting under color of law, for policies which proximately caused constitutional injury despite the municipality's contention that it acted in good faith. Contrary to Judge Merritt's assertion, our decision in this case does not "adopt a uniform rule that all judicial decisions apply prospectively only." It reiterates instead the rationale and effect of *Chevron*, which has been repeatedly cited with approval since it was announced some seventeen years ago.

We have concluded that *Garner* (*Garner II* and *Tennessee v. Garner*) constituted a departure from clearly established prior precedent or law. We believe that it logically follows that it would bring about a "substantial inequitable" result to apply *Garner*'s new principle retroactively to the City of Chattanooga.

We are here considering the retroactivity of a prior decision in a civil case context, not in application to a criminal case involving constitutional rights of other similarly situated criminal defendants. The general rule, even in the criminal case context, about retroactive application of a "clear break with the past" rule was set out in *United States v. Johnson*, 457 U.S. 537, 549-50 (1982):

> [W]here the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," *Desist v. United States*, 394 U.S. at 248, it almost invariably has gone on to find such a newly minted principle nonretroactive. See *United States v. Peltier*, 422 U.S. 531, 547, n. 5 (1975) (Brennan, J., dissenting) (collecting cases). In this . . . type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the " 'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course," *Williams v. United States*, 401 U.S. [646,] at 659 [(1971)] (plurality opinion). Once the Court has found that the new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually compelled a finding of nonretroactivity. See, *e.g.*, *Gosa v. Mayden*, 413 U.S. [665], at 672-673, 682-685 [(1973)] (plurality opinion); *Michigan v. Payne*, 412 U.S. [47], at 55-57 [(1973)].

A deeply divided Supreme Court was concerned in *Griffith v. Kentucky*, _ U.S. _ , 107 S. Ct. 708, 716, 93 L.Ed.2d 649 (1987), about this "clear break rule" when "only one of many similarly situated defendants receives the benefit of the new rule" in a criminal case context, particularly when there was evidence of unconstitutional racial discrimination or racial exclusion in jury selection which may have tainted an entire criminal proceeding and resulting conviction of black defendants whose cases were pending on direct review. In that situation, the court held that *Batson v. Kentucky*, 476 U.S. 79 (1986), was to be applied retroactively to those cases pending on direct review.

It is clear that *Griffith* does not overrule *Chevron Oil*, nor should it, by implication, be applied in a civil case context.

> We noted in *Johnson* that our review did not address the area of civil retroactivity. See 457 U.S. at 563, 102 S. Ct. at 2594. *That area continues to be governed by the standard announced in Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S. Ct. 349, 355, 30 L.Ed.2d 296 (1971).

107 S. Ct. at 713 n.8 (emphasis added).

We are chastised by Judge Merritt in his dissent for not acknowledging a number of cases that allegedly "have applied *Garner* retroactively." (Pages 18, 19 of Merritt Opinion). We address those cases but note, as he concedes, that these "courts did not expressly analyze whether *Garner* should have retroactive effect." Indeed, none of them (except one from the Eleventh Circuit)[12] refers to *Chevron* (or to any asserted *Owen v. City of Independence* restriction upon *Chevron*), nor do they make any retroactivity analysis about the effect of *Garner* on the use of deadly force by police as authorized by the common law and/or by a law such as that of Tennessee in the case of use of such force as a reasonable last resort to capture a fleeing felon. Some of these cases do not apply to a municipal defendant such as the City of Chattanooga.

First, we refer to *Fernandez v. Leonard*, 784 F.2d 1209 (1st Cir. 1986). That case involved the shooting by an FBI agent of a kidnap victim in an attempt to capture the kidnappers. The court reversed a grant of summary judgment to the FBI agent based on immunity claims. Of course, the City of Chattanooga may claim no immunity since *Owen*. The *Fernandez* case is not really applicable here because the court described the individual defendant's actions as "so excessive and brutal

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[12]That case, *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985), is referred to and distinguished at n.11.

that it 'shocks the conscience' " under the rationale of *Rochin v. California*, 342 U.S. 165 (1952). 784 F.2d at 1216. "There was no need for the application of *any* force by the defendant" according to *Fernandez*. *Id.* It held generally that by 1976 it was a violation of due process rights and of unlawful seizure rights for government officials to employ such use of excessive, deliberate, and unnecessary force to bring about the death of an innocent victim. The court did note that ". . . *Garner* decides a *novel question* of law. . . ." *Id.* at 1217 n.3 (emphasis added).

Kidd v. O'Neil, 774 F.2d 1252 (4th Cir. 1985), *overruled on other grounds by Justice v. Dennis*, 834 F.2d 380 (4th Cir. 1987), involved a case of claimed police brutality in beating a prisoner while in custody. The dismissal of the pro se plaintiff's case was reversed, because the court held that brutality and excessive use of force upon a prisoner involved a Fourth Amendment claim, and that there was "confirmed long-standing authority to the same effect in this circuit." *Id.* at 1255. We see little, if any, applicability of the reference to *Garner* in *Kidd* to the situation in the instant case.

Griffin v. Hilke, 804 F.2d 1052 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3184 (1987). In this § 1983 case, there was no consideration or discussion of municipal liability, and the court did not discuss the individual defendant's qualified immunity claim. The defendant's motion for a new trial was ordered because it was held to be error for plaintiff's counsel to have argued to the jury that the government was financially responsible for the individual officer's actions.

Ryder v. City of Topeka, 814 F.2d 1412 (10th Cir. 1987). Plaintiff sued in respect to a 1979 episode in which she was shot by a pursuing police officer after a suspected Pizza Hut robbery. The court affirmed jury verdicts for the defendant police officer and city despite the fact that plaintiff was a 14 year old female who was discovered to be unarmed after being shot as she fled the crime scene. The *Ryder* court

acknowledged some disagreement with *Pruitt v. City of Montgomery, supra,* in its interpretation of *Garner.* The *Ryder* court found constitutionally permissible "[i]n limited circumstances, . . . the use of deadly force to apprehend a fleeing felon." 814 F.2d at 1417. It observed further:

> There might be numerous situations that would justify a police officer's belief that a suspect was armed and that he posed an immediate threat to the officer, even though the suspect was not in fact armed. . . . [W]e conclude that whether a particular seizure is reasonable is dependent on the "totality of the circumstances" and not simply on whether the suspect was armed.

Id. at 1419 n.16 (citation omitted).

Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985). This case involved a minor passenger injured in an automobile when the police set up a roadblock to stop the driver, an allegedly known mental patient, who had committed a *traffic offense.* (There was a serious doubt in *Jamieson* as to whether the driver was a fleeing felon in any event, and the two passengers with him were innocent parties as the police knew. *See id.* at 1207.) A vigorous dissent took issue with the majority's reversal of the dismissal of the claim. *Jamieson* held that under the circumstances asserted, the Fourth Amendment indicates that a "seizure" must be reasonable and that a roadblock may constitute a seizure. There was no discussion about whether this was actually a "fleeing felon" situation.

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984). This 75 page opinion makes one footnote reference to *Garner. Id.* at 1278. Under Wisconsin law the city was held liable to indemnify defendants, white police officials, held liable by a jury as conspirators for being involved in a grossly negligent and unnecessary racially motivated killing of a black man who was a fleeing misdemeanant, and for an attempt over many years to cover up the true facts of the killing. The issue

in *Garner* was found to be "to some extent related" to the issues involved in *Bell*. We see no real relationship of *Garner* to the *Bell* situation, and we see no relationship between the unlawful and unnecessary use of deadly force upon a fleeing unarmed, and known to be unarmed, misdemeanant whose tail light was out, as was the case in *Bell*, and the circumstances in the instant case. Municipal liability in *Bell* was based on indemnity principles only, and not on any municipal policy or practice.

We have not previously cited or relied upon these cases cited by Judge Merritt in his dissent because they do not discuss or consider the issues which are here involved concerning municipal liability under § 1983 or whether, under *Chevron* principles, the Supreme Court's *Garner* decision should be retrospectively applied. We do not believe they are authority which deals with the kind of *Chevron* analysis which Judge Merritt himself seems to concede is warranted in this case.

In summary, in applying the *Chevron Oil* analysis in this case, we conclude that *Garner II* and *Tennessee v. Garner* should not have been retroactively applied to the City of Chattanooga. On that basis, the defendant City would be entitled to judgment as a matter of law. The district court instructed the jury regarding the principles articulated in *Garner II*, *aff'd sub nom. Tennessee v. Garner*, 471 U.S. 1 (1985), and the jury returned a verdict for the City. The trial judge was, however, in error in submitting the issues in this case to the jury on the basis of retroactive application of *Garner* for the reasons heretofore stated. He should have granted judgment as a matter of law to the City because it was not at the time following a clearly established unlawful or unconstitutional policy. Accordingly, we reverse the judgment of the district court on the issue of retroactivity and grant judgment for the City on its cross-appeal.

While we affirm a judgment for the defendant City of Chat-

tanooga, for the reasons stated, we hold that the district court was in error in instructing the jury by retroactive application of the principles set out in *Garner II*, which had been decided only a short time before. Carter, in effect, received more favorable consideration than she was entitled to, but the jury, nevertheless, returned a verdict for defendant. We hold that the district court's analysis of the pre-*Garner II* law in this circuit on December 21, 1982, the date of the fatal shooting of Carter, was correct in its January 27, 1984 memorandum[13] and that he should have granted the City's motion for summary judgment or the City's motion for directed proof at the conclusion of all the evidence. (It is interesting to note that plaintiff had not even presented a fourth amendment claim at the time *Garner II* was decided.) The district court, however, was correct in overruling plaintiff's motion for a new trial and for judgment notwithstanding the verdict. In short, it was not error to enter a judgment for the defendant City based upon the proof and evidence in this case and upon nonretroactive application of *Garner II*. The City, at the critical time was not following a clearly established unlawful, or unconstitutional policy. We accordingly affirm the entry of judgment for the City but for the reasons herein set out, not for the reasons expressed by the district court.

We have reached the same result as did the district court, judgment for the defendant City of Chattanooga, but on different grounds. Even if *Garner II* and *Tennessee v. Garner* were deemed to be properly retroactively applied, however, there is a strong argument that may be made for the affirmance of the jury verdict. In light of the full discussion herein and our determination that the *Garner* rule should not have been retroactively applied to the City of Chattanooga, we find no reason to consider or rule upon that issue.

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[13]This memorandum cited *Cunningham*, *Beech*, *Qualls*, and *Wiley* with the latter's criticism of *Mattis v. Schnarr*, *supra*, noted.

We **AFFIRM** the judgment for the City of Chattanooga for the reasons stated.

MERRITT, Circuit Judge, dissenting. *Tennessee v. Garner*, 471 U.S. 1 (1985), and our *Garner II* opinion which the Supreme Court affirmed, 710 F.2d 240 (6th Cir. 1983), limit the authority of the police to shoot to kill. By holding that this fundamental principle of the *Garner* opinions applies only prospectively, the majority's opinion demonstrates a fundamental misunderstanding of the principle of retroactivity and creates an unnecessary conflict in the circuits on an important constitutional issue. The majority basically looks only to *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), and then gives it an erroneous interpretation. This view reveals a lack of understanding of the general principle that judicial decisions have retroactive effect. *See Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621 (1987). The majority ignores the "usual rule" that federal cases are decided "in accordance with the law existing at the time of decision." *Id.*; *see also Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969); *United States v. The Schooner Peggy*, 1 Cranch 103, 109 (1801).

For hundreds of years the common law applied the current rule of law to pending cases, and thereby established a strong presumption that all judicial decisions apply retroactively.[1] This presumption grew out of the view that judges were not creators but discoverers of the law. *Linkletter v. Walker*, 381 U.S. 618, 622 (1965). As Blackstone explained, judges were "not delegated to pronounce a new law, but to maintain and expound the old one." 1 W. Blackstone, *Commentaries* 69 (1765). A new ruling did not mean that a contrary old rule was "*bad law*, but that it was *not* law." *Commentaries* at 70

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[1]*See* J. Gray, *The Nature and Sources of the Law* 218-24 (2d ed. 1921); M. Hale, *History of the Common Law* 141 (5th ed. 1794); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962).

(emphasis in original). Chief Justice Marshall made the same point:

> [I]f, subsequent to the judgment [in the trial court] and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment . . . which cannot be affirmed, but in violation of law, the judgment must be set aside.

The Schooner Peggy, 1 Cranch at 110. To the same effect, Justice Holmes:

> I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years.

Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910)(dissenting). And Chief Justice Rehnquist:

> The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.

United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982).

The majority opinion presents a distorted picture both of the decisional evolution of the Supreme Court ruling in *Garner* and of the legal standard that must be met to justify the exceptional step of applying a judicially determined rule of law nonretroactively. Specifically, the majority opinion:

(1) mischaracterizes the relationship between the Sixth Circuit and Supreme Court decisions in *Garner* and the earlier "fleeing felon" precedents;

(2) fails to recognize that under *Owen v. City of Independence*, 445 U.S. 622 (1980), the narrow exceptions [illegible]mitted

by *Chevron* must be narrowed further in a case involving a municipal defendant and a constitutional issue, thus providing additional reason to apply *Garner* retroactively;

(3) misstates the principal purposes that underlie the litigation of constitutional torts under § 1983 and exaggerates the "hardship" that might result from requiring municipal governments to be sensitive to developing constitutional trends; and

(4) creates a conflict with the rule of retroactivity adopted, either expressly or implicitly, and applied by seven other circuits. It also ignores the inequity that results when similarly situated victims of constitutional deprivations are treated differently due to inconsistent and unprincipled application of nonretroactivity.

I.

The majority's first task is to establish that the defendant in this case—now only the City of Chattanooga—should have relied on the validity of the Tennessee statute permitting the use of deadly force to apprehend unarmed, nonviolent felony suspects. This reliance factor, as described by *Chevron*, requires that:

> [T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, *see, e.g., Hanover Shoe v. United Shoe Machinery Corp.*, [392 U.S.] at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen v. State Board of Elections*, [393 U.S.] at 572.

404 U.S. at 106. The majority's explanation of how this language applies to the *Garner* principle suffers from two critically important defects.

* * *

First, *Garner* did not overrule a clear past precedent, either in the Supreme Court or the Court of Appeals, on which the City of Chattanooga reasonably could have relied. Because officer Kyle shot Adrian Carter on December 21, 1982, we examine prior case law established as of that date in order to determine if the City relied on a clear past precedent to justify its use of deadly force. On December 21, 1982, there was no Supreme Court opinion on the subject, and the following six cases relating to Tennessee's fleeing felon statute had been decided by federal courts: *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971); *Beech v. Melancon*, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); *Qualls v. Parrish*, 534 F.2d 690 (6th Cir. 1976); *Wiley v. Memphis Police Dept.*, 548 F.2d 1247 (6th Cir.), *cert. denied*, 434 U.S. 822 (1977); *Garner I*, 600 F.2d 52 (6th Cir. 1979); *Haislah v. Walton*, 676 F.2d 208 (6th Cir. 1982).

An examination of these cases reveals that no past precedent had established that Tennessee's fleeing felon statute was constitutional on the basis of the Fourth Amendment. And two of these cases clearly indicated that the constitutionality of the statute was an open question.

Cunningham, *Beech*, *Qualls* and *Wiley* each discussed Tennessee's fleeing felon statute, but none of these cases focused on the issue of *Garner*: whether such police conduct may violate the Fourth Amendment. As our 1983 panel opinion in *Garner II* said, the "question under the Fourth Amendment is one of first impression in this Court." 710 F.2d at 243. *See Cunningham*, 323 F. Supp. at 1075-76 (statute not unconstitutional on its face under Eighth and Fourteenth Amendments); *Beech*, 465 F.2d at 426 (relying on *Cunningham*, statute not unconstitutional; Fourth Amendment not discussed); *Qualls*, 534 F.2d at 694 (police officer justified to believe deadly force necessary; no constitutional issue discussed). *Wiley* is the only case in which the Fourth

Amendment was even mentioned, and then only as one of six separate constitutional theories involved on a *jurisdictional* basis. 548 F.2d at 1248. The *Wiley* opinion, however, contained no discussion of the Fourth Amendment claim and relied only on *Cunningham* and *Beech*, both due process holdings. Because it was decided before *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), *Wiley* did not address municipal liability and held only that the individual officers were entitled to good faith immunity because they "had a right to *assume* that the statute was constitutional." *Id.* at 1251 (emphasis added). *Wiley* did not hold that the Tennessee statute passed Fourth Amendment muster.

The majority attempts to justify its assertion that *Garner I* contained no "warning signal" by a long and detailed recital of the failure of Judge Wellford, then sitting as a district judge, to discern that signal upon remand in *Garner I*. Two other district judges, however, did not find the message of *Garner I* so difficult to understand. *See, e.g., Taylor v. Collins*, 574 F. Supp. 1554, 1558 (E.D. Mich. 1983)(*Garner I* foretold Sixth Circuit's decision in *Garner II*); *Jacobs v. City of Wichita*, 531 F. Supp. 129, 132 (D. Kan. 1982)(after *Garner I*, the Sixth Circuit no longer "reads its prior opinions as based on . . . the constitutionality of the common law rule"). In *Taylor*, in which the District Court concluded that "retroactive application of *Garner II* is appropriate," 574 F. Supp. at 1559, Judge Newblatt explained that a law review comment cited in *Garner I* "reveals that the historical foundation of American state fleeing-felon statutes is a foundation built on loose sand." *Id.* at 1558. Judge Newblatt concluded that after *Garner I*, "the *Garner II* Fourth Amendment ruling . . . was no shock." *Id.* It seems to me that the plain meaning of the Court's language in *Garner I* clearly signaled in 1979 to various cities, including Chattanooga, that Tennessee's statute as applied to unarmed, nonviolent felony suspects, might violate the Fourth Amendment. Moreover, if there were any doubt about the meaning of *Garner I*, the Sixth Cir-

cuit *repeated the warning* again in an opinion published *eight months before* Carter was shot in Chattanooga. *See Haislah v. Walton*, 676 F.2d 208 (April 21, 1982).

In *Haislah*, another case involving a fleeing suspect, the Sixth Circuit reversed a jury decision for the city and a police officer in part because the district court's instructions misleadingly "implied that the absence of [police officer] Walton's liability meant that . . . no constitutional violation has been committed." 676 F.2d at 214 n.3. The court explained:

> When the asserted justification is the apprehension of a fleeing felon, however, the exoneration of the police officer does not necessarily settle the constitutionality of his conduct or the liability of his governmental employer. *See Garner [I]*, 600 F.2d 52, 54-55 (6th Cir. 1979).

Id.

Could it have been plainer that the Sixth Circuit viewed the constitutionality of the fleeing felon statutes as in some doubt?

Thus, there was no "clear past precedent" in *Cunningham*, *Beech*, *Qualls*, and *Wiley*, none of which involved the Fourth Amendment, and each of which centered on the issue of good faith immunity for the individual officer. And the majority's disregard of the clear signal in *Garner I*, a signal repeated again in *Haislah*, reveals how result-oriented the majority's mission here is.

For years many have considered the type of police killings condoned here morally wrong and constitutionally suspect. The majority is wrong that *Garner* created a "novel" rule. Almost twenty years ago former Chief Justice Warren Burger said in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 419 (1971), "that a 'shoot' order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for car thieves, pickpockets or a shoplifter." And as we noted

in *Garner II*, 710 F.2d at 246, the Sixth Circuit more than 100 years ago said that an officer cannot legally kill an unarmed, nonviolent, fleeing suspect:

> Suppose, for example, a person were arrested for petit larceny, which is a felony at the common law, might an officer under any circumstances be justified in killing him? I think not. The punishment is altogether too disproportionate to the magnitude of the offense.

United States v. *Clark*, 31 F. 710, 713 (1887).

Moreover, the majority ignores the Supreme Court's historical summary in *Tennessee* v. *Garner* that "the long-term movement has been away from the rule that deadly force may be used against any fleeing felon." 471 U.S. at 18. The Court reviewed studies reporting that "only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon; 86.8% explicitly do not." *Id.* at 19. The Court noted that the Model Penal Code rejected the old common law rule. The Court concluded that, in view of the more enlightened policies adopted by the police themselves, "the older and fading common-law view is a dubious indicium" of the continuing constitutionality of the Tennessee statute. *Id.*

The majority gives scant attention to two recent Eleventh Circuit cases in which separate unanimous panels explicitly ruled that under *Chevron*, *Garner* should apply retroactively. *Acoff* v. *Abston*, 762 F.2d 1543, 1548-49 (11th Cir. 1985); *Pruitt* v. *City of Montgomery*, 771 F.2d 1475, 1478-83 (11th Cir. 1985); *see* Opin. at 29 n.11, 33 n.12. In *Acoff*, Judge Johnson explained:

> We hold that the *Garner* decision was not an entirely new and unanticipated principle of law that would justify nonretroactivity. The decision, while not a simple application of past precedent, did follow the

> "balancing" methodology of many recent Supreme Court opinions. . . . There was no prior precedent overruled by *Garner*. Nor does the decision apply to any longstanding and widespread practice which the Supreme Court had sanctioned in prior cases or ignored while lower courts had approved of the practice with near unanimity. Indeed, several courts had expressed the view that certain uses of deadly force such as the one in question here violate the Constitution.

762 F.2d at 1549 (citations omitted).

In two recent Supreme Court cases, *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), and *Saint Francis College v Al-Khazraji*, 107 S. Ct. 2022 (1987), the Court provided a vivid illustration of the importance of "clear past precedent" in the retroactivity determination under *Chevron*. In *Saint Francis*, the Court upheld the nonretroactive application of *Wilson v. Garcia*, 471 U.S. 261 (1985), because when plaintiff filed his suit, it was clearly established in the Third Circuit that a § 1981 plaintiff must comply with a six year statute of limitations. 107 S. Ct. at 2025-26. In *Goodman*, however, the Supreme Court ruled that because there was no clear past precedent relating to the statute of limitations on which a plaintiff could rely, *Wilson v. Garcia* should apply retroactively. 107 S. Ct. at 2621-22.

The two cases involved the application of a statute of limitations for the same cause of action, 42 U.S.C. § 1981, in the same (Third) Circuit. The difference between the two cases was that the plaintiff in *St. Francis* filed his lawsuit after two Third Circuit cases had expressly held that the six year limitation applied. The *Goodman* plaintiff's suit was filed *before* those two cases, at a time when there was no "established precedent in the Third Circuit," the law was "unsettled," and thus a decision "should be given the customary retroactive effect." *Goodman*, 107 S. Ct. at 2622. Thus, the *Wilson v.*

Garcia Supreme Court holding was applied retroactively in the same circuit to a case filed in 1973 but not to a case filed in 1980. The difference obviously was not time, but precedent and the strength of the reliance interest at stake.

In *Garner*, we are dealing not with a question of which state statute of limitations should apply, a narrow, specific question of federal common law, but rather with a broad constitutional question under the Fourth Amendment which had not been conclusively decided in the Supreme Court or elsewhere. *See Bradley v. Richmond School Board*, 416 U.S. 696, 719 (1974).

Moreover, the reliance question here is how the Supreme Court's decision in *Garner*, not this Court's decision, should be applied. It is a strange constitutional principle of retroactivity that prohibits police shootings in Alabama but permits them in Tennessee. Nothing in this circuit's line of cases creates the kind of strong reliance interest that might justify such an anomalous result.

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The second major flaw in the majority's analysis of *Chevron*'s reliance factor is its failure to understand the narrowing effect that *Owen v. City of Independence*, 445 U.S. 622 (1980), must have on nonretroactivity in cases of municipal liability. In *Owen*, the City had discharged the plaintiff two months before the Supreme Court had issued its opinions in two cases that served to establish the *Owen* plaintiff's right to a hearing. The district court had held that the City could not be "reasonably . . . charged with constructive notice of such rights." *Id.* at 631 n.10. But the Supreme Court flatly rejected the City's argument that it

> could not have been aware of [petitioner's] right to a name-clearing hearing in connection with the discharge [and] should not be charged with predicting the future course of constitutional law.

Id. at 634.[2] The Court held that "municipalities have no immunity from damages liability flowing from their constitutional violations." *Id.* at 657. And, the Court explained:

> [E]ven where some constitutional development *could not have been foreseen* by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, *albeit newly recognized*, have been violated.

Id. at 655 (emphasis added).

Finally, the Court announced that it wanted to "create an incentive for officials who *may harbor doubts* about the lawfulness of their intended actions to *err on the side* of protecting citizens' constitutional rights." *Id.* at 651-52 (emphasis added).

The *Chevron* analysis must be carried out in the clear light of *Owen*. Although *Owen* is about qualified immunity and *Chevron* is about nonretroactivity, both are squarely focused on the issue of *reliance* that is common and crucial to both doctrines. Surely when we analyze whether to apply a new basis for constitutional liability nonretroactively, we should not exempt a city from liability under *Chevron* if that same city should be liable under the express holding of *Owen*.

Neither do I think that the phrase "an issue of first impression whose resolution was not clearly foreshadowed," *Chevron*, 404 U.S. at 106, should be applicable to this type of § 1983 case, involving a constitutional issue and a city defendant. Even apart from the narrowing effect of *Owen*, the mere fact that a case is one of first impression whose result

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[2]Like Chattanooga, the City of Independence in *Owen* relied on prior case law which did not establish a clear precedent that the city's actions violated a constitutional right. *See* 445 U.S. at 633 n.13, 634.

has not clearly been foreshadowed ordinarily does not, by itself, suffice to trigger nonretroactivity. The few Supreme Court cases of this "first impression" type all contained other compelling reasons to bar retroactive application, *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)(new rule applied prospectively to avoid substantial injustice and hardship against thousands of litigants who relied on jurisdiction of bankruptcy courts); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1968)(substantial inequity and hardships would result if elections voided; decision applies prospectively); *Allen v. State Board of Elections*, 393 U.S. 544, 571-72 (1968)(elections not voided; new rule applies prospectively). In each of these cases, the Supreme Court applied new judicial decisions nonretroactively to avoid substantial hardship, inequitable results, or massive disruption. Here, retroactive application of *Garner* hardly approaches the impact of disrupting thousands of bankruptcy decisions or voiding elections already held.

Therefore, the fact that the *Garner* Fourth Amendment holding was one of "first impression" is of no moment to the *Chevron* reliance analysis. The only inquiry necessary is whether the city relied on a clear past precedent. If the reliance was not based on a clear past precedent, the city's reliance was not justified and therefore the new rule must apply retroactively.

In this case, there existed no precedent holding that the fleeing felon statute complied with the Fourth Amendment, and two Sixth Circuit cases had declared the law in this area unsettled. Likewise, the law of the nation as a whole was not settled. The Supreme Court had never spoken on the question. Chattanooga certainly should have harbored some doubt about the constitutionality of its fleeing felon policy, and could not have reasonably relied on existing law to justify its authorization of deadly force.

II.

The majority's cryptic discussion of *Chevron*'s second factor is also troublesome. Under *Chevron* the court must:

> weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its application.

404 U.S. at 107. The majority not only distorts *Garner*'s effect on deterring cities from unconstitutional policies, it also virtually ignores *Garner*'s remedial purpose of providing compensation.

In the majority's view, the primary purpose of *Garner*— a purpose the majority obviously considers of dubious value — is to deter cities from certain policies sanctioning deadly force in violation of the Fourth Amendment. Because it is too late to deter past policies or conduct, the majority concludes we should not apply *Garner* retroactively. The opinion states:

> Modifying one's behavior to comply with a future change of a rule, particularly an unforeseeable change, is difficult if not impossible. Retroactive application of *Garner* would, therefore, have little, if any, effect of furthering the deterrent goal of *Garner*.

Opin. at 21-22.

By claiming that the purpose of *Garner* is to deter the city from violating only those legal standards that are already crystal clear, the majority has erected a "stand pat" approach that is flatly contrary to the stated purpose of the Civil Rights Act and once again flatly contrary to the holding of the Supreme Court in *Owen v. City of Independence*. It is true that one cannot deter the performance of an illegal act already committed. But the logical outcome of the majority's

approach would be the adoption of a uniform rule that virtually all judicial decisions apply prospectively only. Under this approach, the Supreme Court should not have applied the new *Garner* rule to *Garner* itself, and except in "easy" cases no court would apply its instant holding to the instant facts. The majority's error is demonstrably fundamental, and as Justice Holmes pointed out in the *Kuhn* case, 215 U.S. at 372, contrary to "near a thousand years" of Anglo-American jurisprudence.

The majority's view that deterrence must be limited to only *foreseeable* changes in the law has a superficial appeal, reminding one of the concepts of duty and proximate cause in tort law. But the Supreme Court rejected this formulation, as discussed at length above, in *Owen*. Cities are to be held liable for, and thus be deterred from, violations even when the constitutional rights in question are "newly recognized" and the result of "some constitutional development [which] *could not have been foreseen* by municipal officials." 445 U.S. at 655 (emphasis added).

The Supreme Court in *Owen* also recognized that § 1983 actions have *two* main purposes, not only to deter against future constitutional deprivations, but also "to provide compensation to the victims of past abuses," 445 U.S. at 651, (citing *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978); *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978)). The majority virtually ignores *Garner*'s effect on a suspect's constitutional rights and only grudgingly acknowledges that victims of such violations are entitled to receive compensation. Retroactive application of *Garner* would make Chattanooga understand the seriousness of violating a suspect's Fourth Amendment rights through deadly police force.

The majority makes the remarkable assertion that compensation of victims of constitutional deprivations is "merely a consequence" of a § 1983 judgment applying the *Garner* principle. Opin. at 21. It omits the actual language from *Owen* describing the essential purposes of § 1983 actions.

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.

445 U.S. at 651. The Court also explained:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an *incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights.* Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Id. at 651-52 (footnotes omitted)(emphasis added); *see also* Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 72 (1965).

The majority also does not appreciate that recovery of damages is essentially the *only* means of enforcing the *Garner* rule. In most other cases in which the constitutional deprivation is a matter of criminal procedure, enforcement is primarily guaranteed by operation of the exclusionary rule, *see Payton v. New York*, 445 U.S. 573 (1979); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Johnson v. United States*, 333 U.S. 10 (1948). In *Elkins v. United States*, 364 U.S. 206, 217 (1959), the Supreme Court explained that the exclusionary rule

> is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

But in situations like *Garner*, usually no tangible evidence or statements are retrieved as a result of the constitutional violation. Thus, the usual threat of the exclusionary rule does not help guarantee compliance with the Supreme Court's rule that deadly force violates an unarmed, nonviolent felony suspect's Fourth Amendment rights. Without an enforcement mechanism, the Court has no effective means of requiring compliance with constitutional decisions. In *Garner* cases, then, the remaining enforcement mechanism is the threat of an action for damages under § 1983 against cities with policies sanctioning the use of deadly force against unarmed, nonviolent felony suspects.

III.

Finally, *Chevron* requires a court to weigh:

> the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce *substantial inequitable results* if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma,* [395 U.S.] at 706.

404 U.S. at 107 (emphasis added). As already discussed above, applying the *Garner* rule retroactively does not at all implicate the types of hardship or disruption that sometimes have sufficed to justify nonretroactivity.

In considering equity and consistency in the application of the law, we note that the Supreme Court applied the *Garner* rule in the *Garner* case. The shooting of Edward Garner occurred October 3, 1974; the shooting of Adrian Carter

occurred December 21, 1982. More difficult to conceive than anything else said by my colleagues in the majority is their statement that "weighing and balancing of the equities in this case," Opin. at 22, requires denying recovery to the mother of this dead boy who, though unarmed and on the run was shot in the back in violation of the Fourth Amendment of the Constitution of the United States. There is nothing in any of the opinions in *Garner* quite so "novel" as that.

It is striking that no less than seven other circuits have applied *Garner* retroactively. *Fernandez v. Leonard,* 784 F.2d 1209, 1217 (1st Cir. 1986)(under *Garner*, police officer violated suspect's Fourth Amendment rights on December 27, 1976); *Kidd v. O'Neil,* 774 F.2d 1252, 1255-56 (4th Cir. 1985)(under *Garner,* summary judgment reversed where police used excessive force against suspect on April 15, 1983); *Griffin v. Hilke,* 804 F.2d 1052, 1055 (8th Cir. 1986), *cert. denied,* 107 S. Ct. 3185 (1987)(*Garner* applies to § 1983 action where suspect shot on February 18, 1978); *Ryder v. City of Topeka,* 814 F.2d 1412, 1417-18 (10th Cir. 1987)(*Garner* applies to suit where fleeing suspect shot by police on March 25, 1979); *Pruitt v. City of Montgomery,* 771 F.2d 1475, 1478-79 (11th Cir. 1985)(*Garner* applies to § 1983 action where plaintiff shot by police on September 1, 1982); *see also Jamieson v. Shaw,* 772 F.2d 1205, 1209-10 (5th Cir. 1985)(District Court should have permitted plaintiff suspect to amend complaint with Fourth Amendment claim under *Garner* for injury on July 25, 1982); *Bell v. City of Milwaukee,* 746 F.2d 1205, 1278 n.87 (7th Cir. 1984)(*Garner II* applies to § 1983 action where fleeing suspect shot by police on February 2, 1958). In these cases, courts did not expressly analyze whether *Garner* should have retroactive effect. They assumed it. Despite the majority's lengthy attempt to distinguish the facts of these cases from *Garner* and *Carter,* it does not—and cannot—deny that these courts did indeed apply the *Garner* holding to these earlier incidents.

The Supreme Court's decision on the Tennessee statute at issue in *Garner* had obvious implications for the 18 other states which also retained codifications of the old common law fleeing felon rule. On issues of "great national concern," the presumption of retroactivity must be applied with more force than usual. *Bradley v. Richmond School Board*, 416 U.S. 696, 719 (1974)(applying liability for attorney fees in desegregation case retroactively against municipal school board). Across the country many other past victims of excessive police force are being recompensed, and the city defendants are not even arguing the issue of *Garner*'s retroactivity. As explained *supra*, pp. 45-46, the Eleventh Circuit in *Acoff v. Abston*, 762 F.2d 1543, 1548-49 (11th Cir. 1985), fully analyzed whether *Garner* should apply retroactively and concluded that it should.[3]

Basically, what has happened in this *en banc* case is that the majority—in its hostility to the liberalization of the law by the Supreme Court and in its zeal to show that the panel decisions of this Court in *Garner I* and *Garner II* were wrong —has forgotten that the question before us concerns the

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[3]In *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), the Supreme Court ruled that new criminal procedural rules automatically apply retroactively to pending cases on direct appeal. *Griffith* may provide some support for the view that *Garner* should automatically apply retroactively because the duty to respect suspects' *Garner* rights arises from a Fourth Amendment principle which finds its most common application in criminal procedure. Consistency may require that *Griffith* apply to civil cases, such as this one, arising out of criminal episodes. The extent of the applicability of *Griffith* in the civil context is an open question, and there are difficult counterarguments. For example, in the criminal area, the *Griffith* rule of automatic retroactivity applies only to cases on direct review. *Allen v. Hardy*, 106 S. Ct. 2878 (1986), continues to hold that a new rule of criminal procedure is applied retroactively on collateral review in habeas corpus cases only if it has "a fundamental impact on the integrity of factfinding." *Id.* at 2878. Thus the question of *Griffith*'s applicability remains unresolved; in light of our discussion above, we need not address it further.

retroactivity of the *Supreme Court*'s opinion in *Garner*. No other court has agreed with the majority, and every sensible argument leads to the opposite conclusion.

In conclusion, the holding in *Garner* should have been applied retroactively as a matter of law to the facts of this case. The District Judge did so when he ruled as a matter of law that the Chattanooga policy was unconstitutional and when he charged the jury that Kyle was acting in conformity with municipal policy. However, his instructions to the jurors allowed them to engage in a redetermination of the "constitutionality" or "unconstitutionality" of the City's policy insofar as it treated all burglars as potentially dangerous. App. 140-51, 191. The jurors' verdict for the City probably resulted from a decision that the City's policy was constitutional, but it may have resulted from a conclusion that Kyle had the requisite probable cause to shoot. If the former, the verdict was contrary to law. If the latter, it was a verdict that no reasonable jury could have reached, given the testimony of Officer Kyle that he shot Carter solely because he was a fleeing burglar. App. 77-78, 103-04. The District Court should have granted plaintiff's motion for judgment notwithstanding the verdict.

BOYCE F. MARTIN, JR., dissenting. I am profoundly troubled by the majority's willingness to embark upon a difficult journey of legal reasoning that travels upon one-way unilluminated passageways and which reaches a destination, I believe, that affords unequal justice in the vindication of constitutional rights. I join, therefore, the dissent of Judge Merritt.

No. 86-1717

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEON WASHINGTON, suing on his behalf and as personal representative of the Estate of Hardy James, Jr.,
Plaintiff-Appellant.

v.

DEAN STARKE; DALE EASTON; BENTON TOWNSHIP; THE CITY OF BENTON HARBOR; and SAM WATSON,
Defendants-Appellees.

RONALD KIENZLE; et al.,
Defendants.

ON APPEAL from the United States District Court for the Western District of Michigan.

Decided and Filed August 26, 1988

Before: KEITH, MILBURN and NORRIS, Circuit Judges.

MILBURN, Circuit Judge. Plaintiff-appellant Leon Washington, suing on his behalf and as the personal representative of the Estate of Hardy James, Jr., appeals the district court's order granting summary judgment wherein the court found

that the individual defendants were entitled to qualified immunity and dismissed the pendent state claims. For the reasons that follow, we affirm.

I.

During the early morning hours of June 20, 1982, Hardy James, Jr., and two accomplices were in the process of burglarizing Comet True Value Hardware in Benton Township, Berrien County, Michigan. Officers Keith Diamond and Ronald Kienzle of the Benton Township Police Department responded to a breaking and entering call and arrived at the hardware store shortly after 3:00 a.m. and, upon arrival, reported a broken window. Shortly thereafter, two police officers from the City of Benton Harbor, Michigan, Dean Starke and Dale Easton; two deputies of the Berrien County Sheriff's Department, Thomas Yops and Maurice Crandell; and Benton Township Police Officer Michael Krugh arrived to provide backup assistance.

Kienzle, Diamond and Yops entered the building while the other officers remained outside. Officer Kienzle alerted the others that he had discovered a large pile of guns near the broken window. Upon further investigation, Kienzle discovered Hardy James, Jr., hiding in an aisle. Before an arrest could be made, James fled toward the window entrance and the large pile of weapons. Kienzle identified himself as a police officer and ordered James to halt, but James did not respond and continued to run toward the broken window and pile of weapons. Kienzle then fired three rounds from his .357 revolver, all missing James. James then jumped out of the building through the broken window, encountered Deputy Crandell, and the two struggled briefly. However, James eventually broke loose and continued to flee on foot.

While Officers Krugh, Crandell and Starke pursued James, the other officers remained on the scene with James' accomplices. Officers Krugh and Crandell also shouted at James to

stop, but to no avail. Officer Krugh then fired a round from his shotgun, apparently nicking James in the right hand. Krugh then heard Crandell warn James to stop or he would shoot. Continuing pursuit, Krugh again warned James to stop, and when he did not, Krugh fired two more rounds from his shotgun at James. The three officers continued to pursue James, and Officer Starke fired two rounds from his .38 revolver, the second of which struck Hardy James, Jr., in the back of the skull and killed him. The body was recovered 298 feet from the spot where Officer Starke fired.

This action was filed by plaintiff Leon Washington, suing on his behalf and as the personal representative of the Estate of Hardy James, Jr., pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986, alleging that the various defendants violated decedent's rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, in addition to pendent state claims of negligence, gross negligence, and wrongful death.

There were originally three separate groups of defendants in this action: (1) the City of Benton Harbor, Michigan, its Public Safety Director, Sam Watson, and two police officers, Dean Starke and Dale Easton; (2) Benton Township, Michigan, its Chief of Police, Jack Drach, and three police officers, Ronald Kienzle, Keith Diamond, and Michael Krugh; and (3) Berrien County, Michigan, its Sheriff, Forrest Jewell, and two deputies, Thomas Yops and Maurice Crandell.

The district court entered judgment on the various defendants' motions for summary judgment. The district court held that the individual defendants were entitled to qualified immunity from liability on plaintiff's section 1983 claim. The district court also dismissed plaintiff's section 1986 claim as being untimely, and dismissed plaintiff's pendent state claims against defendant Sheriff Jewell for being untimely as well. *Washington v. Starke*, 626 F. Supp. 1149 (W.D. Mich. 1986).

At a later hearing on January 30, 1986, the district court dismissed plaintiff's remaining pendent state claims without prejudice. After that dismissal, plaintiff filed those claims in the Berrien County, Michigan, Circuit Court. After a hearing on May 15, 1986, a settlement was reached of the remaining federal claims, and the district court entered an order on June 24, 1986, dismissing plaintiff's action with prejudice.

Plaintiff-appellant raises two issues in this appeal. First, he argues that the district court erred in dismissing the plaintiff's section 1983 action against the individual defendants on the basis of qualified immunity. Second, he argues that the district court erred in dismissing the plaintiff's pendent state claims.

II.

Generally, a section 1983 claim must be predicated on the deprivation of a federal constitutional right, as a right guaranteed only under state law is inadequate. *Bird* v. *Summit County, Ohio*, 730 F.2d 442 (6th Cir. 1984) (per curiam). Alternatively, the constitutional right may arise out of the substantive laws and regulations of a state and be protected by the due process clause of the Fourteenth Amendment. *See Beard* v. *Livesay*, 798 F.2d 874 (6th Cir. 1986); *Franklin* v. *Aycock*, 795 F.2d 1253 (6th Cir. 1986). In the present case, as the district court noted,[1] "[p]laintiff's § 1983 claim is based upon the Supreme Court's March 27, 1985 ruling in *Tennessee* v. *Garner*, 471 U.S. [1], 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985)." *Washington*, 626 F. Supp. at 1151.

We recently held in *Carter* v. *City of Chattanooga*, _ F.2d _ (6th Cir. 1988) (en banc) (slip op. Nos. 84-5247/5276, June 27, 1988), that *Garner* would only be applied prospectively. As the shooting at issue in this appeal occurred six months

[1]Plaintiff stipulated at oral argument that his cause of action was based solely on *Garner*.

before the shooting at issue in *Carter*, the Court's holding in *Garner* cannot be used as a basis for plaintiff's section 1983 claim. Arguably, plaintiff is also claiming a denial of the decedent's substantive due process rights as protected by the Fourteenth Amendment as a basis for a section 1983 action, under the law as it existed at the time of the shooting. *See Landrum v. Moats*, 576 F.2d 1320, 1325 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978) (fleeing felon rule found violative of substantive due process). Therefore, we will consider the merits of plaintiff's argument that the district court improperly held that the individual defendants were entitled to qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court rejected the inquiry into the state of mind of the person seeking immunity in favor of a wholly objective standard for determining whether or not qualified immunity exists. The Court found that public officials[2] "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. As the Supreme Court later noted in *Davis v. Scherer*, 468 U.S. 183 (1984), "[w]hether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' No other 'circumstances' are relevant to the issue of qualified immunity." *Davis*, 468 U.S. at 191 (citation omitted). Thus, the central issue in the present case is whether a reasonable police officer could have believed, in light of clearly established law, that the use of deadly force was lawful under the circumstances. *See Anderson v. Creigh-*

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[2]The Supreme Court has recently made it clear that police officers are considered public officials and therefore entitled to qualified immunity when appropriate. *Anderson v. Creighton*, ___ U.S. ___, 107 S. Ct. 3034 (1987).

ton, _ U.S. _, 107 S. Ct. 3034 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

In the present case, it is undisputed that at the time of the shooting, controlling precedent in this circuit and in Michigan courts specifically upheld the common law fleeing felon rule, which permitted the use of deadly force to prevent the escape of a fleeing felon. It is also undisputed that Michigan had no statutory law on point at the time of the shooting. *See Washington*, 626 F. Supp. at 1153. Thus, the next question for consideration is whether or not a substantive right in the plaintiff's decedent was clearly established by administrative action.

It is further undisputed that there were no state administrative rules or regulations that would establish such a right at the time of the shooting. The only basis for asserting the existence of a constitutional right that would operate to preclude the application of qualified immunity can be found in the intra-departmental policies and regulations of the defendant police departments. Specifically, the Benton Harbor Police Department and the Berrien County Sheriff's Department had similar intra-departmental regulations in effect at the time of the shooting that indicated that the actions of the officers were improper.[3] The important aspects of the Benton Harbor intra-departmental guidelines are set out as follows:

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[3]In the cover letter accompanying General Order 76-10-12-A, issued October 12, 1976, Chief Rodez of the Benton Harbor Police Department indicated that the purpose of the policy was to establish policy, rule, and procedure with regard to the use of firearms. Specifically, the police chief noted his *belief* that the law of the State of Michigan was imprecise as to when deadly force could be used, and that the regulations were to provide the officer with guidelines to protect the officer from subsequent criminal or civil action as a result of his use of deadly force.

A. FIREARMS MAY BE USED IN THE FOLLOWING SITUATIONS:

. . .

4. *Fleeing Offender*—Only when it is a known felon who has used, or threatened to use, deadly force in the commission of a crime and when all other attempts to prevent escape have failed. An important aspect in making a decision to use deadly force is:

(a) Whether or not to delay the arrest may result in additional injury or death to officer or other persons.

(b) The likelihood of a nonviolent apprehension at a later date.

. . .

B. FIREARMS SHALL NOT BE USED IN THE FOLLOWING INSTANCES:

5. *Suspicion of Felony*—Deadly force shall not be used on mere suspicion that a crime, no matter how serious, has been committed, or that the person being sought committed the crime. The officer should either have witnessed the crime or have sufficient and reliable information to *know* as a virtual certainty that the suspect committed an offense to which deadly force was used or threatened.

. . .

**NOTE that the crime of burglary in and of itself is not considered a violent felony. Therefore, deadly force shall *not* be used to prevent the escape of a burglary suspect. Better a delayed apprehension of

> a suspect, who in many cases is a juvenile, than placing an officer in legal jeopardy.[4]

After reviewing the above guidelines, the trial court properly concluded that "[t]he upshot of the order was not that it *was* unconstitutional, either under state or federal law, to use deadly force in such situations, but from the aspect of the department and the individual officer, it was better to be safe than sorry." *Washington*, 626 F. Supp. at 1155 (emphasis in original). *At the time of the shooting, the Benton Township Police Department did not have such a policy, but rather followed the Michigan common law allowing the use of deadly force to apprehend a fleeing felon. See Washington*, 626 F. Supp. at 1156.

In determining whether state-enacted rules create a protected liberty interest, the key is "whether or not the state has imposed 'substantive limitations' on the discretion of [officers] . . . or, in other words, whether the state 'has used language of an unmistakably mandatory character.' " *Franklin*, 795 F.2d at 1260 (citations omitted). The *mandatory* nature of the regulation is the key, as a plaintiff "must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it." *Bills* v. *Henderson*, 631 F.2d 1287, 1292 (6th Cir. 1980).

The above regulation does not remove officer discretion in the use of deadly force, but simply gives criteria to be used in the exercise of that discretion. While the regulation does restrict the officer's discretion through the use of the above criteria, the restrictions still turn on the observations and conclusions of the individual officer and, therefore, do not substantially restrict his use of deadly force.

Moreover, "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their con-

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[4]Benton Harbor Police Departmental Order #76-10-12-A.

duct violates some statutory or administrative provision." *Davis*, 468 U.S. at 194.

> Such officials as police officers or prison wardens, to say nothing of higher level executives levels who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules, "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively."

Davis, 468 U.S. at 196 (quoting P. Shuck, *Suing Government*, 66 (1983)).

Therefore, "officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages." *Davis*, 468 U.S. at 194 n.12. In sum, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right[,]" and "in the light of preexisting law the unlawfulness must be apparent." *Anderson*, 107 S. Ct. at 3039.

The critical question is whether the intra-departmental regulations created a constitutionally protected interest, or whether the intra-departmental regulations established procedures and guidelines for protecting what is now, but was not at the time, a recognized Fourth Amendment right against unreasonable seizure through the use of deadly force. *See Spruytte v. Walters*, 753 F.2d 498 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S. Ct. 788 (1986). Violation of the intra-departmental regulation would not have given rise to a cause of action for damages under either federal or Michigan law at the time of the shooting. The purpose of the regulation was not to prohibit the use of deadly force, but to offer guidelines and criteria for officers to use in their determination of when deadly force was proper. While the officer in

question may have been subject to intra-departmental disciplinary action, his action did not constitute a wrong recognized by federal or state law. Therefore, violation of the regulation does not preclude the application of qualified immunity to the individual officers.

Finally, we find that no matter how mandatory or non-discretionary the intra-departmental regulation is characterized, it can never preclude the application of qualified immunity as long as it is in clear contradiction with Michigan and federal law. Plainly stated, a police chief, through the issuance of an intra-departmental regulation without any formal rule-making procedure, cannot create a constitutional equivalent of an act of the legislature or of the state that can overturn the clear common law of the state.

Otherwise, had officers from the different government entities of the City of Benton Harbor and Benton Township fired at nearly the same instant, which could easily have happened in the present case, the existence of a section 1983 cause of action would depend upon whose bullet actually killed the decedent. If both bullets were equally fatal, it would be illogical for only one officer to be liable. As the district court noted, "[i]t would be ludicrous to hold that an individual's cause of action for deprivation of constitutionally protected liberty interest depends upon whose bullet strikes when the state and federal law in force at the time plainly allowed all of the officers to shoot at him." *Washington*, 626 F. Supp. at 1156. Therefore, we find that the district court properly dismissed plaintiff's section 1983 action on the basis of qualified immunity.

Plaintiff also argues that the district court abused its discretion in dismissing plaintiff's pendent state claims. We disagree. It is a clear rule of this circuit that if a plaintiff has not stated a federal claim, his pendent state law claims should be dismissed. *See Hooks v. Hooks*, 771 F.2d 935, 944-45 (6th Cir. 1985); *Bird*, 730 F.2d at 444.

III.

Accordingly, for the reasons stated, the opinion of the district court is AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing appendix has been forwarded by U.S. Mail, postage prepaid, on this the 20th day of September, 1988, to the following persons:

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